CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 663

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY, PETITIONER,

vs.

MAJOR RUFF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1933

CERTIORARI GRANTED JANUARY 15, 1934

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN SUPERIOR COURT OF WARREN COUNTY

ORIGINAL PETITION—Filed Jan. 25, 1933

The petition of Major Ruff, hereinafter referred to as the plaintiff, complains against Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, hereinafter referred to as the defendant, and shows:

1

The Savannah & Atlanta Railway is a Georgia corporation, with its residence and principal office at Savannah, Georgia, and operating a line of railroad in said State from Savannah, Georgia, to Warrenton, Georgia.

2

That on the — day of ——, 19—, the defendant, Charles E. Gay, Jr., was appointed as Receiver of said Railway Corporation by the Judge of the United States Court of the Southern District of Georgia, in the exercise of equity powers of that court and since said date, said defendant as such Receiver has been engaged in carrying on the business connected with such railway property, to-wit: the operation of the same as a railroad.

3

That while so engaged in operating said railroad property as such Receiver, the said defendant injured and damaged the plaintiff in the sum of Five Thousand ($5,000) Dollars by reason of the facts hereinafter alleged.

4

On September 21, 1931 at about daylight, freight train No. 211, pulled by Engine No. 500, while being operated by the employees of said Receiver, ran over and killed the minor son of plaintiff, one Joseph Ruff.

5

Said homicide occurred at Reese's Crossing, in Warren [fol. 3] County, Georgia, about six miles from Warrenton, Georgia. Just prior to the time when he was run over by said railroad train, said Joseph Ruff was lying on the track unconscious as a result of either seizure of illness or of intoxication, the exact cause of his being on said track being unknown to plaintiff. The track of The Savannah & Atlanta Railway is straight for one half a mile or more from the direction in which the train was coming, to wit, from Savannah to Warrenton, and the agents of the defendant operating the engine and train at said time and place were able to see and did see the said Joseph Ruff lying on the track several hundred yards away from the point at which he was lying, which was at or near Reese's Crossing.

The said agents of the defendant rang the bell and blew the whistle of the engine on approaching said Crossing, as required by the statute and in an effort to arouse said Joseph Ruff, whom they saw even at that distance, lying on the track ahead of them;

When the train reached a point within about one hundred (100) yards where the said Joseph Ruff was lying on the track, the said Joseph Ruff was awakened by the whistle and bell of the engine and his conduct, manner and demeanor was such as to indicate to the agents of defendant operating said train that he was not in control of his facilities because when he awoke he stood up in the middle of the track with a wild look in his eyes and instead of making any effort to get off the track, merely jumped up straight in the air, so that the engine and train of defendant ran over and killed him.

6

Plaintiff shows that in the exercise of ordinary care and caution, the agents of defendant operating the engine and train of defendant knew or ought to have known that the said Joseph Ruff was not in posssession and control of his senses and that it was their duty in the exercise of or- [fol. 4] dinary care and diligence, to have stopped said train, which they had ample time to do after they saw the condition of said Joseph Ruff, but which they did not do

because they supposed that he would get off of the track before the train could strike him; under these circumstances, plaintiff alleges that the failure of defendant's agents to entirely stop said train after they saw that the man on the track was helpless and lacked control of his facilities, was a failure to exercise ordinary care and diligence in order to prevent the homicide that occurred.

7

Plaintiff shows that at the time of said homicide, said Joseph Ruff was nineteen years of age and died without leaving a wife, child or children, or representative of child or children, or a mother surviving him and that plaintiff is the father of said Joseph Ruff, upon whom plaintiff was dependent and to whose support the said Joseph Ruff contributed.

8

That at the time of the homicide, said Joseph Ruff had an earning capacity of at least Twenty-five ($25.00) Dollars per month as a farm laborer, and his capacity to earn money would have increased as he grew older.

9

Plaintiff sues for the full value of the life of his said son, which he alleges to be the sum of Five Thousand ($5,000) Dollars.

Wherefore, Plaintiff prays that process may issue requiring the said defendant, Charles E. Gay, Jr., Receiver of the Savannah & Atlanta Railway, to be and appear at the next term of the Superior Court of said County to answer this complaint.

Thos. W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Plaintiffs.

[fol. 5] State of Georgia,
Warren County:

In Superior Court of Warren County

Major Ruff

versus

Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway

Process—Filed Jan. 25, 1933

Complaint

To the Sheriff of said county and his lawful deputies, Greeting:

The Defendant, Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, — hereby required personally or by attorney, to be and appear at the Superior Court, to be held in and for said County on the First Monday in April, next, then and there to answer the Plaintiff's demand in an action of complaint, as in default thereof the Court will proceed as to justice shall appertain.

Witness the Honorable C. J. Perryman, Judge of said Court, this 25 day of January, 1933.

A. E. Massengale, Clerk.

[File endorsement omitted.]

[fol. 6] Georgia,
Warren County:

I have this day served a copy of the within petition and process on Savannah and Atlanta R. R. Co. by giving a copy of same to Henry Ricketson, Agent of said defendant, in charge of their office at Warrenton, said State and County.

This the 26th day of January, 1933.

J. S. Buckhalter, Dep. Sheriff, Warren Co., Ga.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Law. 447

MAJOR RUFF

vs.

CHARLES E. GAY, JR., Receiver of Savannah & Atlanta Railway

PETITION FOR REMOVAL.—Filed Feb. 21, 1933

Damages

To the District Court of the United States for the Southern District of Georgia, Augusta Division:

Now comes the above named defendant, Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, and respectfully shows:

1. The above entitled suit at law was filed in the Superior Court of Warren County, Georgia, a State court, held in and for said County and State, on January 25, 1933, and is returnable to the April Term, 1933, thereof, which convenes on the first Monday, the 3rd day of April, 1933. In said suit, Major Ruff is the plaintiff and Charles E. Gay, Jr., as Receiver of Savannah & Atlanta Railway, is defendant.

2. Petitioner desires to remove said suit from the said State court to this Honorable Court pursuant to the provisions of Judicial Code Section 33 as amended, R. S. 643, 28 U. S. C. Section 76.

3. There has been no trial of said suit or any final hearing thereof, and this petitioner, defendant therein, is not required to plead thereto or to otherwise appear therein until the 3rd day of April, 1933. Said suit will not be ripe for trial until the July Term 1933 of said Superior Court of Warren County, Georgia, which convenes on the first Monday in July next. This District Court of the United States for the Southern District of Georgia, Augusta Division, is the District Court of the United States next to be holden in the District and Division where the said suit is pending.

[fol. 8] 4. The said suit is in the nature of a civil suit for damages, in the sum of $5,000.00, for the alleged negligent homicide averred by the plaintiff therein to have been suffered and sustained by his minor son, Joseph Ruff, on or about September 1, 1931, which homicide it is averred was proximately caused by negligence of your petitioner, the defendant therein, as Receiver of said Savannah & Atlanta Railway, in the performance of his duty as such Receiver, in and about the management and operation of the property and trains of the said Savannah & Atlanta Railway in his custody and control as such Receiver.

5. Heretofore, to-wit, on or about March 4, 1921, petitioner was duly appointed as Receiver for the Savannah & Atlanta Railway by an order of the District Court of the United States for the Southern District of Georgia, Savannah Division, in a certain Equity cause therein pending, and then entitled Theodore G. Smith and John B. Johnston, plaintiffs, against Savannah & Atlanta Railway, defendant, in Equity, Receivership, etc., and being Case No. 90 on the Equity docket of said Court; and continuously thereafter petitioner has been acting as such Receiver, and is now so acting, by virtue of the orders of this Honorable Court, the said receivership proceeding, however, by a consolidation with other causes, now being entitled The Farmers' Loan & Trust Company, Trustee, complainant, against Savannah & Atlanta Railway and Charles E. Gay, Jr., defendants, Consolidated cause in Equity No. 256 on the Equity docket of said Court.

6. Your petitioner duly qualified as such Receiver in accordance with the provisions of the orders of this Court as aforesaid, and is now so qualified, and is in charge and control of the property, assets, management and operation of the said Savannah & Atlanta Railway, and as such Receiver was at all times mentioned in said complaint filed by Major Ruff, and now is, an officer of a court of the United States; and the said suit filed by the said Major Ruff is a civil suit or action against petitioner as such officer of a court of the United States, for and on account of [fols. 9 & 10] alleged acts done by him under the color of his office, or in the performance of his duty as such officer of a court of the United States.

7. By reason of the foregoing facts, your petitioner as such Receiver and officer of a court of the United States is entitled under the provisions of the Judicial Code of the United States herein mentioned, as amended, to remove the said plaintiff's suit from the Superior Court of Warren County, Georgia, a State court, to the District Court of the United States for the Southern District of Georgia, Augusta Division.

Wherefore your petitioner prays that the above entitled suit by the said plaintiff be entered on the docket of this court, and proceed as a cause originally commenced in this court, would proceed; and that the Clerk of this Court be directed to issue a writ of certiorari to the said Superior Court of Warren County, Georgia, convening at Warrenton, Georgia, in said County, requiring it to send to this court all the records and proceedings in said cause, and to stay all further proceedings in said State Court.

E. P. & J. Cecil Davis & Hitch, Denmark & Lovett,
Attorneys for Petitioners.

Duly sworn to by Charles E. Gay, Jr. and A. B. Lovett. Jurats omitted in printing.

[fol. 11] In United States District Court

Order for Writ of Certiorari—Filed Feb. 21, 1933

Upon motion of A. B. Lovett, Esq., of Hitch, Denmark & Lovett, Attorneys-at-Law, of Savannah, Georgia, of counsel for the defendant in the above case, and on filing of the petition of Charles E. Gay, Jr., as Receiver of Savannah & Atlanta Railway, and the District Court of the United States for the Southern District of Georgia now being in session,

It is ordered that a writ of certiorari issue herein to the Superior Court of Warren County, Georgia, a State court, requiring said court to transmit the record and proceedings in the said cause, entitled Major Ruff versus Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, at Law, Damages, to this Court, so that the said District Court of the United States may act thereon as of right and according to law ought to be done.

Further ordered that said writ be served by the Marshal of this Court upon the Clerk of said State Court, unless service thereof by said Clerk be acknowledged or waived.

In open Court, this the 15th day of February, A. D. 1933.

Wm. H. Barrett, United States Judge.

[fol. 12] In United States District Court

Writ of Certiorari—Filed Feb. 21, 1933

The President of the United States of America to the Superior Court of Warren County, Georgia, a court of the State of Georgia, held in and for Warren County, Georgia, at Warrenton, Georgia, in this Judicial District and Division, Greeting:

Being informed that there is now pending before you a suit filed January 25, 1933, wherein Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, appointed as such by the District Court of the United States for the Southern District of Georgia, Savannah Division, is defendant, and Major Ruff, is plaintiff, and that said suit is brought against an officer of the Court of the United States for or on account of alleged acts done by him under color of his office or in the performance of his duty as such officer; and that the trial or final hearing thereof has not yet been had; and it appearing that the District Court of the United States for the Southern District of Georgia is now in session, and an order for this writ of certiorari to issue having been entered by the Honorable William H. Barrett, United States Judge of said Court, presiding;

Therefore, the District Court of the United States for the Southern District of Georgia does hereby command you that you send without delay to the Augusta Division of said District Court as aforesaid the record and proceedings in said cause, so that the said District Court of the United States may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Barrett, Judge of the District Court of the United States for the Southern District of Georgia, at Savannah, Georgia, this 15th day of February, A. D. 1933.

Scott A. Edwards, Clerk, United States District Court for the Southern District of Georgia.

(Court Seal.)

[fol. 13] GEORGIA,
Warren County:

I, A. E. Massengale, as Clerk of the Superior Court of Warren County, Georgia, in and for said County and State, at Warrenton, Georgia, certify and acknowledge that I have received the original writ of certiorari, of which the within and attached is a duplicate copy, issued out of the United States District Court for the Southern District of Georgia, Augusta Division, by Scott Edwards, Clerk of said District Court, said writ of certiorari having been issued on the 15th day of February, A. D., 1933, to the Superior Court of Warren County, Georgia, in and for said State and County, at Warrenton, Georgia, requiring it to send to the District Court of the United States for the Southern District of Georgia, Augusta Division, the record and proceedings in the cause of Major Ruff versus Charles E. Gay, Jr., as Receiver of said Savannah & Atlanta Railway; and that said writ of certiorari has this day been filed in the office of the Clerk of the Superior Court of Warren County, Georgia, in and for said County and State at Warrenton, Georgia.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Superior Court of Warren County, Georgia, in and for said County and State, at Warrenton, Georgia, on this the 17 day of February, A. D., 1933.

A. E. Massengale, as Clerk of the Superior Court of Warren County, Georgia, in and for Said County and State. (Seal.)

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed April 1, 1933

Now comes the plaintiff in the case above stated and moves to remand said case to the State Court for trial therein, upon the following grounds, to-wit:

1

Because the defendant herein is not "an officer of the courts of the United States" within the purview and true intent and meaning of the Acts of Congress approved Au-

gust 23, 1916, amending Section 33 of the Judicial Code of the United States (U. S. Code, Title 28, Section 76).

2

Because the suit filed by the plaintiff in the State Court and removed to this Court is not a civil action against the defendant "for or on account of any act done under color of his office, or in performance of his duties as such officer" within the purview and true intent and meaning of said Act of August 23, 1916, amending Section 33 of the Judicial Code of the United States.

3

Because in said suit the plaintiff brought action against such defendant as Receiver of such railroad property "in respect to acts or transactions of his in carrying on the business connected with such property" and that said action was properly brought in the State Court within the purview and true intent and meaning of Section 66 of the Judicial Code of the United States as amended (U. S. Code, Title 28, Section 125), and for that reason, and under said statute, the said suit was properly brought in the Superior Court of Warren County, Georgia, and is not removable to this Court on the sole ground, as shown by the petition for removal in this case, that the defendant is an officer of this Court and is being sued in the State Courts for and on account of alleged acts done by him under color of his office or in the performance of his duty [fol. 15] as an officer of a court of the United States.

4

Because this Court has no power to remove said suit from the State Court and no jurisdiction to hear and determine the same.

Wherefore, Plaintiff submits this written motion to remand and prays that the said suit and all proceedings therein be remanded to the State Court, namely, to the Superior Court of Warren County, Georgia, for disposition therein.

Thos. W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Movant.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

OPINION AND JUDGMENT DENYING MOTION TO REMAND Filed April 3, 1933

WM. H. BARRETT, District Judge:

The receiver of the Savannah & Atlanta Railway was appointed by the United States District Court for the Southern District of Georgia.

Major Ruff, brought suit in the state court against said receiver to recover damages for the alleged negligent killing of his son by the agents of the receiver by operating a train on the line of said railway. Acting under the authority of Section 76 of Title 28 U. S. C. A., R. S. 643, said case was removed by the receiver to the United States district court of the division in which is included the county where such suit was brought.

Plaintiff moves to remand said cause upon the following grounds:

1. The defendant is not "an officer of the courts of the United States", within the purview and true intent of said Section 76.

2. Because said suit is not a civil action against the defendant "for or on account of any act done under color of his office, or in performance of his duties as such officer" within the purview of such section.

3. Because said suit was brought against such receiver "in respect to acts or transactions of his in carrying on the business connected with such property" and such action was properly brought in the state court within the purview and true intent of Section 125 of Title 28 U. S. C. A., and is therefore not removable.

4. Because this court has no power to remove said suit from the state court and no jurisdiction to hear and determine the same.

It is important to understand exactly the language and the dates of the respective statutes involved.

[fol. 17] The aforesaid section 125, which is the act of March 3, 1887, as amended on August 13, 1888, reads as follows:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect

of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the Court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

At the date of the enactment of said section 125 the relevant parts of section 76 reads as follows:

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law" said suit or prosecution may by prescribed proceedings be removed to the appropriate United States court.

On August 23, 1916, the said section was amended by incorporating therein after the last words of the aforesaid quotation, namely, "revenue law", the following:

"* * * or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer."

1. It is both appropriate and convenient to deal with grounds 1 and 2 of the motion to remand in this one section.

"It is frequently and authoritatively said that a receiver is an officer of the court appointing said receiver."

Clark on Receivers, Section 34, citing, among many other authorities, Porter v. Sabin, 149 U. S. 473; Stuart v. Boulware, 133 U. S. 78; Booth v. Clark, 17 How. (58 U. S.) 321; Quiney v. Railway Co., 145 U. S. 82; Union Bank v. Kansas City Bank, 136 U. S. 223; Atlantic Trust Co. v. Chapman, 208 U. S. 360.

Among other allegations in the original petition in this [fol. 18] case are the following:

"* * * the defendant, Charles E. Gay, Jr., was appointed as Receiver of said Railway Corporation by the judge of the United States Court of the Southern District of Georgia, in the exercise of equity powers of that Court and since said date (date of appointment), said defendant as such Receiver has been engaged in carrying on the business connected with such railway property, to wit: the operation of the same as a railroad.

That while so engaged in operating said railroad property as such Receiver, the said defendant injured and damaged the plaintiff in the sum of Five Thousand ($5,000) Dollars by reason of the facts hereinafter alleged."

In view of such allegations and decisions it is difficult to understand upon what bases can be soundly rested the contentions either that the receiver is not an "officer of the courts of the United States" or that the original action in this case was not "for or on account of any act done under color of his office or in the performance of his duties as such officer".

There is abundant authority that a receiver is such an officer of court. Matarazzo v. Hustis, 256 Fed. 887; American Locomotive Co. v. Histed, 18 Fed (2nd) 656; Newell v. Byram (D. C.), 18 Fed. (2nd) 657 (C. C. A. 8th), 26 Fed. (2nd) 200; Berens v. Byram, 26 Fed. (2nd) 953; Elliott v. Wheelock, 34 Fed. (2nd) 213; Barnette v. Wells Fargo National Bank, 270 U. S. 438.

2. Grounds 3 and 4 of the motion to remand are dealt with together. Movant urges that such section 125 is a special act dealing only with suits "in respect of any act or transaction of his in carrying on the business connected with such property", and that the general act of 1916, amending said section 76, cannot have the effect of repealing said section 125, under the well established principle that a prior special act is not repealed by a subsequent general act unless it is specifically so declared or "the implication to that end be irresistible". Rogers v. United States, 185 U. S. 83; Petri v. Creelman Lumber Co., 199 U. S. 487; Ex parte United States, 226 U. S. 420; Washington v. Miller, 235 U. S. 422.

It is further urged by movant, that in view of the decision of the Supreme Court of the United States in Gableman v. Peoria Railroad Co., 179 U. S. 335, and especially in view of the sub quoted statement by Chief Justice Fuller, [fol. 19] the whole purpose of the act of 1887-1888 would be defeated if the right of removal existed and that therefore the intention to repeal such special act by implication does not exist, and that if Congress had intended so to repeal such act it would have explicitly done so.

For appreciation of the cogency of this argument if is essential to exactly understand the Gableman case. This case was before the Supreme Court on a certificate which states that the receiver removed the cause into the circuit court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States"; and again, "The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court * * *."

It is thus manifest that the question for determination was in exceedingly narrow limits, namely: did the appointment of a receiver by a federal court cause all of his actions as such receiver to arise "under the Constitution and laws of the United States"?

The inevitable sequitur from this is that all statements not involved in the decision of this one question are obiter. The decision was that such appointment of a receiver did not have such effect.

In discussing the said act of 1887-1888 the Chief Justice, on page 338, used this language:

"This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed

to Congress, and, moreover, such a right would be inconsistent with the general policy of the act."

[fol. 20] It is respectfully submitted that the statements contained in the last quoted paragraph are obiter. Even if the right of removal had been embodied in the acts of 1887-1888 there would have been at least two most important rights accorded to plaintiffs. First, because even if removal were allowed it would be in the proximate neighborhood of the plaintiff, because the removal must be to the district court in whose territory the county where the suit was brought is located, relieving of the necessity of going into some distant jurisdiction, and frequently into another state, in order to assert one's rights; and, second, the right of a jury trial was preserved. It must follow therefore that the right of removal was not necessarioy destructive of the policy evidenced by such act.

Under the foregoing analysis of said act which conclusion is proper: that urged by the movant, that the act of 1887-1888 was a special act and is therefore not repealed by the act of 1916, or that the act of 1916 should have the full effect of its language and therefore it repealed pro tanto such portion of said act of 1887-1888 as prevented a removal, if said original act had such effect?

The language, as above quoted, of said act of 1887-1888, that the receiver "may be sued in respect of any act or transaction of his in carrying on the business connected with such property", and the language of the said act of 1916, as embodied in said section 76, that any officer of a court of the United States may remove when suit is brought against him "for or on account of any act done under color of his office or in the performance of his duties as such officer", seems to me to manifest that the same subject matter is being dealt with. If it were intended that the act of 1916 should not have effect upon the removability of causes, authorized by the act of 1887-1888, Congress would inevitably have used some exception rather than use in substance the same language dealing with the same subject matter. This view is strengthened because there is still left as the effects of the act of 1887-1888 the rights above stated.

[fol. 21] It is further urged by movant that because the act of 1887-1888 and also the amending act of 1916 are both incorporated in the United States Code, Ann., that therefore it was the purpose of Congress not to repeal or modify

the act of 1887 1888. It does not so appear to me. No one contends that the act of 1887 1888 was repealed totally by the removability act of 1916, and it was mandatory that the act of 1887 1888 should be incorporated in such Code. It was the imperative duty of the codifiers to incorporate all existing statutes and not to act as a court in determining what or to what extent there was conflict or repeal.

For a further discussion of the issue here dealt with see Newell v. Byram, 26 Fed (2nd) 202, and cases there cited.

Unless the decision of the Supreme Court in Barnette v. Wells Fargo Co., supra, is misconceived this question is decided definitely by the highest court. In the first place, the suit therein involved was not a question of possession of property that was turned over to the receiver at the time of his appointment, but was an action that was alleged to have arisen by fraud on the part of the receiver (predecessor of the one sued) in obtaining certain property by duress, and therefore arose "for or on account of any act done under color of his office or in the performance of his duties as such officer". While it is true that it is recognized, both in the opinion of the court and in the dissenting opinion, that the record did not affirmatively disclose the authority for the removal from the State court to the United States court, the court states (after the following: "* * * we think the presumption should be indulged that the removal was rightly taken, and that the District Court had jurisdiction"):

"The plaintiff contended and the District Court held that, even if there had been no such leave, the suit could be maintained under the legislative permission given in Section 66 of the Judicial Code; but we need not consider that question".

It thus affirmatively appears that the Supreme Court did [fol. 22] know that the district court had decided that the aforesaid section 66 had the effect contended for by the receiver here and took no exception to such conclusion.

The motion to remand is denied.

This 3rd day of April, 1933.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CASE. Filed April 10, 1933

The above stated case having been called in its regular order on the docket for trial, at this, the trial term thereof, the same having been removed by the defendant to this court from the Superior Court of Warren County; and it appearing to the Court that the plaintiff is not prepared to prosecute the same,

Now, on motion of counsel for the defendant, it is ordered and adjudged by the Court that said cause be, and the same hereby is, dismissed for want of prosecution, at the cost of the plaintiff.

In open Court, this the 10th day of April, A. D. 1933.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL. Filed May 27, 1933

To the Honorable William H. Barrett, District Judge:

The above-named Major Ruff, plaintiff in the cause above stated, feeling aggrieved by the decree dismissing his said cause entered in the above entitled case on the 10th day of April, 1933, during the April term of said Court, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the assignment of errors filed herewith and he prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such Court in such cases made and provided; and the said Major Ruff, plaintiff in said cause, hereby petitions the Court that he be allowed to prosecute such appeal as a poor person under the provisions of Section 832 of the United States Code, Title 28, and in that connection, submits herewith to the Court his affidavit setting out that because of

poverty, he is unable to pay the costs of said appeal or to give security for the same and that he believes that he is entitled to the redress he seeks in such appeal;

Appellant further shows that on January 25, 1933, he filed his action against the said Gay, who was operating the said Savannah & Atlanta Railway as Receiver thereof by virtue of the decree of the District Court of the United States for the Southern District of Georgia, for the wrongful and negligent homicide of his minor son, one Joseph Ruff, on or about September 1, 1931, which homicide, plaintiff averred, was proximately caused by the negligence of said Receiver and his agents and servants in and about the management of the property and trains of the Savannah & Atlanta Railway in his custody and control as such re- [fol. 25] ceiver; that said appellant is entitled to maintain the above action under the provisions of Section 4424 of the Code of Georgia and was entitled to institute and try the same in the Superior Court of Warren County, Georgia, under the provisions of Section 60 of the Judicial Code of the United States (Title 28, U. S. C., Section 125);

That subsequent to the institution by appellant of said suit in the State Court, the defendant therein removed said suit to this Honorable Court for trial therein under the provisions of Section 33 of the Judicial Code of the United States, as amended (Title 28, U. S. C., Section 76).

Subsequently thereto, appellant moved in open court to remand said case to the State Court in which it had been instituted for trial therein, said motion being made on the 1st day of April, 1933, and on April 3, 1933, the United States District Court, during the term, denied said motion to remand said case to the State Court, to which judgment refusing to remand the said case, appellant then and there excepted and still excepts;

Subsequently, on April 10, 1933, in open court and during the April term, 1933, of the United States District Court aforesaid; said court entered up final judgment, on motion of counsel for defendant, dismissing said case of the plaintiff for want of prosecution, to which judgment appellant then and there excepted and still excepts.

Appellant contends that the Act of Congress of 1916, amending Section 33 of the Judicial Code of the United States, so as to include within its terms "any officer of the Courts of the United States for or on account of any act

done under color of his office or in performance of his duties as such officer", does not embrace and include suits against a Receiver of the Courts of the United States "in respect of any act or transaction of his in carrying on the business connected with such property", as provided in Section 66 of the Judicial Code of the United States and that such suits are not removable to the Courts of the United States on the sole ground that they are brought [fol. 26] against one of its Receivers, notwithstanding the amendment contained in the Act of 1916 to Section 33 of the Judicial Code of the United States.

In this connection, appellant avers that he has a meritorious cause of action against said Receiver and that according to the best of his knowledge and belief, the allegations contained in his petition filed against said Receiver in the State Court, are true and correct, and he believes in good faith that he is entitled to recover in said suit; appellant further avers that he believes and is advised by his counsel that he is entitled to the redress that he is seeking in this appeal to review and correct the ruling of the District Court in denying his motion to remand his said case to the State Court for trial therein.

Appellant attaches hereto his affidavit setting forth his right to appeal as a poor person under the provisions of the statute in such cases made and provided and also a certificate from his counsel to the effect that in the opinion of such counsel, appellant is entitled to the redress he seeks in such appeal.

Wherefore, your petitioner prays that this his appeal be allowed and that he be allowed to prosecute the same as a poor person.

Major *Ruff*, His (X) Mark, Petitioner. Thomas W. Hardwick & Isaac S. Peebles, Attorneys for Petitioner.

AFFIDAVIT

GEORGIA,

Warren County:

In person appeared before the undersigned, Major Ruff, colored, who being duly sworn, deposes and says that each and every statement made in the foregoing petition is true; that because of his poverty affiant is unable to pay the cost of appeal to the Circuit Court of Appeals for the Fifth Circuit in the said case, or to give security for the same

and that he believes he is entitled to the redress sought by [fol. 27] him in his said appeal.

Major Ruff, His (X) Mark.

Sworn to and subscribed before me this 12th day of May, 1933. Claudie V. Geriner, N. P., Richmond Co., Ga. (Notarial Seal.)

CERTIFICATE OF THOMAS W. HARDWICK

GEORGIA,

Richmond County:

To the Honorable William H. Barrett, United States Judge:

I, Thomas W. Hardwick, counsel for Major Ruff, colored, do hereby certify to the Court that in my opinion, Major Ruff, plaintiff in the cause of Ruff v. Gay, Receiver, who is petitioning for the right to prosecute an appeal therein from the judgment of the District Court of the Southern District of Georgia, Augusta Division, to the United States Circuit Court of Appeals for the Fifth Circuit, has good ground for such appeal and is entitled to the redress he seeks therein.

This 25 day of May, 1933

Thomas W. Hardwick, of counsel of record for appellant.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL IN FORMA PAUPERIS Filed May 27, 1933

The above and foregoing petition for appeal is hereby allowed and ordered filed. Let citation issue in terms of the statute and be served upon the said Charles E. Gay, Receiver.

It is also ordered that the showing made by the said applicant for appeal is, in the opinion of the Court, in good faith and upon the showing made, the appellant, Major Ruff, colored, is entitled to prosecute the same as a poor person in accordance with the provisions of the statute in such cases made and provided, and it is so ordered by the Court.

This May 25th, 1933.

Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 27, 1933

And now comes Major Ruff, the plaintiff (appellant) in the above stated case and in connection with the appeal thereof, makes the following assignment of error, which he avers were committed by the District Court in said case:

1

The Court erred in over ruling and denying the plaintiff's motion to remand the said case to the Superior Court of Warren County, Georgia, for trial therein; order of the Court herewith assigned as error being of date April 3, 1933.

2

The Court erred in entering final judgment dismissing the case of plaintiff in said District Court; said order of the Court herewith assigned as error being of date April 10, 1933.

Wherefore the plaintiff (appellant) prays that said errors may be considered and corrected and that the judgment of the District Court aforesaid dismissing his said case be reversed and that his said case be remanded to the State Court for trial therein.

Thomas W. Hardwick & Isaac S. Peebles, Jr., attorneys for appellant; post office address: 411-416 Marion Building, Augusta, Georgia.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 27, 1933

Be it remembered that on the — day of March, 1933, the defendant in the above stated case caused to be removed to this Court from the Superior Court of Warren County, Georgia, a certain cause then and there pending between Major Ruff, plaintiff, against Charles E. Gay, Jr., as the Receiver of the Savannah & Atlanta Railway, the same being

an action for damages by the plaintiff, Ruff, for the negligent homicide of his minor son, Joseph Ruff, against the defendant, Gay, as Receiver appointed by the United States District Court aforesaid for said Savannah & Atlanta Railway, on account of the negligence of said Receiver and his agents in carrying on the business of said railway property;

Such suit was removed by said defendant under the provisions of Section 33 of the Judicial Code of the United States, as amended, and was legal in form and duly filed in said United States District Court in accordance with the terms of the statute; the said motion to remove, with accompanying papers, being filed in this Court on the — day of March, 1933.

Subsequently thereto, Ruff, the appellant herein, moved in open court to remand said case to the Superior Court of Warren County, in which court it had been instituted, for trial therein, said motion being made on the 1st day of April, 1933, and duly filed on the same day; and on April 3, 1933, the United States District Court, during the term, denied said motion to remand said case to the said State Court, to which judgment refusing to remand said case to said State Court the appellant then and there excepted and still excepts; said judgment being a part of the record, duly filed.

Subsequently, on April 10, 1933, in open court and during the term of the United States District Court, the said Court [fol. 31] entered up final judgment, on motion of counsel for defendant, dismissing said case of the plaintiff (appellant) for want of prosecution, to which judgment appellant then and there excepts and still excepts; said order dismissing said case was duly filed as a part of the record in said case on April 10, 1933.

Now, in furtherance of justice and that right may be done to the plaintiff (appellant), Major Ruff, said Major Ruff tenders and presents the foregoing as his bill of exceptions in this case to the action of the Court and prays that the same may be settled and allowed by the Court and made a part of the record.

This 25th day of May, 1933.

Thomas W. Hardwick, Isaac S. Peebles, Jr., attorneys for appellant; post office address: 411-416 Marion Building, Augusta, Georgia.

[fol. 32] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been by Major Ruff (appellant) presented within the time required by law for as much as the above and foregoing matters as set forth in this Bill of Exceptions do not fully appear of record and the plaintiff (appellant) tenders this his bill of exceptions reserved and prays that the same be allowed; I, the undersigned, United States District Judge, who presided at the trial of said case, have settled and herewith signed said Bill of Exceptions and make the same a part of the record in said case.

This 25th day of May, 1933.

Wm. H. Barrett, United States Judge, Southern District of Georgia.

The above and foregoing bill of exceptions is hereby approved as containing a true statement of the matters therein set out. May 25, 1933.

Hitch, Denmark & Lovett, Attorneys for Charles E. Gay, Receiver of Savannah & Atlanta Railway.

[File endorsement omitted.]

[fol. 33] Citation, in usual form, showing service on Hitch, Denmark & Lovett, filed May 27, 1933, omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT—Filed May 27, 1933

To the Clerk of the United States District Court for the Southern District of Georgia:

The plaintiff (appellant) in connection with his appeal in the above stated case specified the following portions of the record as material to the determination of his appeal and requests that the same be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to be filed in that Court

on or before the ___ day of June, 1933.

1. Plaintiff's suit against the defendant originally filed in Warren Superior Court.

2. The petition and all other papers in connection with the removal by the defendant of the above stated case from Warren Superior Court to the United States District Court for the Southern District of Georgia, Augusta Division.

3. The motion of plaintiff (appellant) to remand said case from the United States District Court to the Superior Court of Warren County for trial therein.

4. The order and judgment of the United States District Court denying and refusing to remand said case to said State Court for trial therein, dated and filed April 3, 1933.

5. The order and judgment of the United States District Court dismissing the case of the plaintiff (appellant) in said District Court, dated and filed April 10, 1933.

6. The petition of Ruff for appeal, with accompanying exhibits and order of Court allowing same.

7. The assignment of errors of appellant.

8. The bill of exceptions and the order of the Court set-
[fol. 35] tling and allowing the same.

9. The citation to the appellee and his acknowledgment of service thereon.

10. This præcipe.

This 25 day of May, 1933.

Thomas W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Appellant. Post Office address: 411-416 Marion Building, Augusta, Georgia.

It is agreed that the foregoing præcipe specifies all of the record material to the appeal in this case. May 25, 1933.

Hitch, Denmark & Lovett, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] Minute entry of argument and submission, Oct. 5, 1933, omitted in printing.

[fol. 38] In United States Circuit Court of Appeals for the Fifth Circuit

No. 7008

Major Ruff, Appellant,

versus

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Southern District of Georgia

November 15, 1933

Before Bryan, Sibley and Hutcheson, Circuit Judges

Opinion of the Court—Filed November 15, 1933

Hutcheson, Circuit Judge:

Plaintiff Ruff brought this suit in the Superior Court of Warren County, Georgia, against the defendant Gay, as receiver of the Savannah & Atlanta Railway by appointment of the United States District Court for the Southern [fol. 39] District of Georgia, for damages for the death of his son, alleging it to have been caused by the negligent operation of one of its trains. A petition filed by the receiver for an order of removal under Sec. 76, 28 U. S. C. A., Sec. 33 Judicial Code as amended, was granted. Ruff's motion to remand was denied, and his suit dismissed for want of prosecution. He appeals.

A judgment of dismissal for want of prosecution is a final judgment, and appealable. Colorado Eastern Ry. vs. Union Pacific Ry. Co., 94 Fed. 342; Wilson vs. Republic Iron & Steel Co., 257 U. S. 92; Zandig vs. Etna Life Ins. Co., 42 Fed. (2) 142. After a final judgment a refusal to remand may be reviewed on appeal. Ex Parte Rowe, 234 U. S. 70; Wilson vs. Republic I. & S. Co., supra.

If the refusal to remand was erroneous, the judgment of dismissal was. That the defendant was an officer of a United States court, and that in the conduct of the business of the railway he was carrying out his duties as an officer

of the court, the point so much, and we think so vainly, labored in the Matarazzo case, 256 Fed. 882, and in the other Federal decisions relied on to sustain the action of the lower court, Newell vs. Byram, 18 Fed. (2) 657, 26 Fed. (2) 300; American Locomotive Co. vs. Histed, 18 Fed. (2) 656, Elliott vs. Wheelock, 34 Fed. (2) 243, goes, we think, without saying. We turn then to a consideration of the controlling question, whether, as appellant contends, the invoked section applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property (Glover vs. Chicago Ry., 16 Fed. (2) 609) or whether, as appellee contends, it applies also to cases brought against him in his representative capacity, where, "with respect to the question of liability, he stands in the place of the corporation," [fol. 40] McNulta vs. Lockridge, 141 U. S. 131,[1] with the result that all suits against receivers are now removable. We are certain that the amendment was not intended by the Congress to so result. For fifty years its policy has been to restrict, not to enlarge, Federal jurisdiction. Particularly has this attitude been manifested in regard to actions against receivers, Act of March 3, 1887, Title 28, Sec. 125, U. S. C. A., Gableman vs. Peoria Ry., 179 U. S. 335.[2]

Note 1.—"His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office. Polk vs. Plummer, 2 Humphreys 500. Jansen vs. Ostrander, 1 Cowan 670. If actions were brought against the receivership generally or against the corporation by name, 'in the hands of' or 'in the possession of' a receiver, without stating the name of the individual, it would more accurately represent the character or status of the defendant. * * * Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." McNulta vs. Lochridge, 141 U. S. 331-332.

Note 2.—See discussion of this point, Barnett vs. Wells Fargo, 270 U. S. 451.

To us it seems bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws. A breach which, in entire reversal of the settled policy of restriction, opens the flood gates of the jurisdiction to pour into the Federal courts all suits against Federal receivers, including, according to some decisions, even those brought under the Federal Employers Liability Acts, the removal of which is expressly forbidden. Behrens vs. Byram, 26 Fed. (2) 953; Elliott vs. Wheelock, 34 Fed. (2) 213, through Knapp vs. Byram, 21 Fed. (2) 217 in the same circuit, is to the contrary. No sounder, safer rule "for the sure and true interpretation of all statutes [fol. 41] in general, be they penal or beneficial, restrictive or enlarging of the common law," has ever been laid down than that set out in Heyden's Case.[4] Under it significance and effect must, if possible, be accorded to every word of the statute. Under it, "every part of the statute must be construed in connection with the whole, so as to make all

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Note 3.—Tennessee vs. Davis, 100 U. S. 257.

Note 4.—"In Heydon's Case in 1584, after all the Barons of the Exchequer had openly argued in court, it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer, that for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) what was the common law before the making of the Act: (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato comodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico." 3 Co. Rep. 7a (76 English Reports, Full Reprint 637).

the parts harmonize, if possible, and give meaning to each." Market Co. vs. Hoffman, 101 U. S. 115; Ex Parte Public Bank, 278 U. S. 104. So construing the statute, we are left in no doubt that "the mischief and defect" for which the statute, before its amendment, did not provide, was not the failure of the statute to authorize receivers to remove actions "against the corporation in their name" into the Federal court; it was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only revenue officers, and persons acting for them, and for the Congress, had enjoyed. Maryland vs. Soper, 270 U. S. 9; Smith vs. U. S. 58 Fed. (2) 735; Davis vs. S. Carolina, 107 U. S. 597. Had the Congress been intending to remove the mischief which the trial court thought the amendment aimed at, that receivers could not remove into Federal courts suits "against the corporation by name in the hands of or in the possession of the receiver," McNulta vs. Lockridge, supra. Had that been "the true reason of the remedy" no statute more unsuited [fol. 42] to afford the remedy because more unrelated to the mischief could have been chosen for amendment, unless indeed the Congress had the intention to make an unsuspected breach in the removal laws, by hiding that breach away in a secret place.

But we are not left to construction to determine what its real intention was. Introduced first in the House on April 6, 1916, as H. R. 14299, the amendment was immediately referred to the House Committee on the Judiciary.[5] On May 27 it was reported back without amendment, accompanied by H. R. 776 Vol. 3. In the light of this report the construction the trial court put on this statute, unreal enough without it, appears yet more unreal. It declared that "outside of typographical corrections, the bill is a recital of the old law, with only one change" by which the words "or against any officer of the courts of the United States for or on account of any act done under color of his office, or in the performance of his duties as such officer" are intended to be inserted. "The purpose of the amendment" says the Report, is "to extend the provisions of Sec.

Note 5.—Congressional Record p. 5619 First Session 64th Congress.

Note 6.—Congressional Record p. 8830.

33 uniformly to officers of the courts of the United States not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws and to officers of the Congress. The omission of such provision from the original Act gives rise to certain incongruities and creates a want of uniformity in the provisions of the law.'" "The statute, with the proposed amendment, does [fol. 43] not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure which enures as much, in fact more, to the benefit of the States than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury. * * * It will be observed therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal courts, in case of prosecution in their official capacity, a regular

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NOTE 7.—"For example, a United States marshal engaged in the execution of a warrant, or other process of a United States court, in a case which involves the prosecution of a violation of the revenue laws, is entitled to the right of removal now conferred by this statute. Davis vs. So. Carolina, 107 U. S. 597 (1882). The same marshal engaged in executing process of the same court in a case in which the revenue law is not involved, is not entitled to the right of removal. This creates an anomolous condition, which cannot be justified upon any line of reasoning."

NOTE 8.—"During the early history of our government the only method by which the supremacy of the Federal law could be maintained in cases in which actions were brought in the State courts against Federal officers, on account of acts done by them in the performance of their duties, was by appeal to the Federal courts from the judgment of the courts of last resort of the States.

The obvious inadequacy of this remedy by appeal caused the Congress to pass statutes authorizing writs of habeas corpus and these were extended by various enactments. Whitten vs. Tomlinson, 160 U. S. 231-239 (1895)."

and orderly right of removal from the State to the Federal courts, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officers to go into custody in order to obtain the writ."

Without discussion or amendment in either House or Senate, the bill as thus reported was passed.

Barnette vs. Wells Fargo Nat. Bank, 270 U. S. 438, relied on as supporting the removal, does not do so. Aside from the fact that the holding of the majority opinion, that in the absence of a showing in the record as to the real ground of the removal, it might be assumed that the suit was properly removed under Sec. 33 as amended, was, because of the absence of such showing, a purely suppositious one, [fol. 44] and therefore not binding as a precedent, it cannot be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally, or "against the corporation in this name."[9]

The section invoked by the receiver is without application to this suit; the remand was improperly denied, the suit improperly dismissed.

The judgment is therefore reversed with directions to set aside the dismissal and remand the cause to the State court.

[fol. 45] In United States Circuit Court of Appeals

No. 7008

Major Ruff

versus

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway

Judgment—November 15, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for

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Note 9.—This is clearly pointed out in the dissenting opinion pages 449-450 and 451.

the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions to set aside the dismissal and remand the case to the State court;

It is further ordered and adjudged that the appellee, Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, be condemned to pay the costs of this cause in this Court.

[fol. 46] In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted]

Motion for Order Staying Mandate—Filed November 22, 1933

Now comes Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, appellee in the above case, and moves the court for a stay of mandate and execution and enforcement of the judgment entered in this case on November 15, 1933, for a period of three months after the entry of such judgment, and shows to the court that he intends to apply for and to obtain if possible a writ of certiorari from the Supreme Court of the United States to review the said judgment of this Court, and that a mandate should be stayed for that length of time to enable him to make application therefor.

Movant offers, if the court requires, to give good and sufficient security, to be approved by a Judge of this Honorable Court, that if he fails to make application for such writ within the period allowed therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he will answer for all damages and costs which the appellant may sustain by reason of the stay; but, in this connection, shows to the court that there is no money judgment or decree involved in said case un-

[fol. 47] der the judgment of the court which he will seek to review, nor is the same for a recovery of any specific property, but the points at issue between the parties re-

late entirely to the jurisdiction of the court, and arise under a motion to remand said case to the State court after its removal to the United States Court by appellant, and for that reason movant says no bond should be required.

(Signed) E. P. & J. Cecil Davis, Hitch, Denmark & Lovett, for Appellee. (Signed) A. B. Lovett, of Counsel.

[fol. 48] In United States Circuit Court of Appeals for the Fifth District

[Title omitted]

Order Staying Mandate. Filed Nov. 22, 1933

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of November, 1933.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI Filed January 15, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument on Monday, February 12, next, immediately following No. 19, Original, Ex Parte: L. W. Baldwin and Guy A. Thompson, Trustees, etc., et al., petitioners.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

DEC 15, 33
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 663

CHARLES E. GAY, Jr., Receiver of Savannah & Atlanta Railway,
Petitioner,

v.

MAJOR RUFF,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. .....

CHARLES E. GAY, Jr., Receiver of Savannah & Atlanta Railway,
Petitioner,

v.

MAJOR RUFF,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case (R. 25), reversing the judgment of the District Court of the United States for the Southern District of Georgia (R. 11, 3 Fed. Supp. 264).

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 15, 1933 (R. 25). The jurisdiction of this court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938; 28 U. S. C., §347 (a)).

Question Presented

The question is whether a suit against a receiver, appointed by a United States Court, in charge of the operation of a railroad, to recover damages from the receivership estate for the alleged negligent acts of his agents operating trains, is removable from a state to a federal court, under Judicial Code §33, as amended August 23, 1916, or whether the invoked section applies only to actions and proceedings brought against the receiver for official conduct where it is sought to hold him responsible in his own person or property.

Statute Involved

The pertinent language of Judicial Code §33, as amended by the Act of August 23, 1916, is:

> "When any civil suit or criminal prosecution is commenced in any court of a state against . . . any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer . . . said suit . . . may at any time before the trial or final hearing thereof be removed for trial into the district court

next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . ."

28 U. S. C., §76; R. S. §643 as amended.

Statement

Respondent, Major Ruff, brought suit for damages in a Georgia court against the receiver of the railway appointed by the District Court of the United States for the Southern District of Georgia in certain proceedings in equity, for the death of his son through the alleged negligent operation of a train on the line of railway.

The bill of complaint alleged, among other things, that the receiver was appointed by the United States Court, in the exercise of equity powers, and since appointment had been engaged in carrying on the business connected with the railway property, to-wit, the operation of the same as a railroad, and that, "while so engaged in operating said railroad property as said receiver, the said defendant injured and damaged the plaintiff by reason of the facts hereinafter alleged" (R. 1). The only prayer was for process, and while it does not expressly appear from the complaint that the judgment sought was asked against the receivership estate and not against the receiver personally, it is to be inferred that the estate only was to be bound.

The case was removed by the receiver to the district court of the United States for the Southern District of

Georgia, Augusta Division, within which the state court proceedings were pending, acting under authority of Judicial Code §33 as amended (R. 8).

Respondent's motion to remand was overruled, the district court holding, in view of the allegations and the decisions referred to in the supporting brief filed herewith, the receiver was "an officer of the courts of the United States," and that the action was "for or on account of an act done under color of his office or in the performance of his duties as such officer" (R. 11, 3 Fed. Supp. 264, 265). Thereafter the case was dismissed for want of prosecution (R. 17).

On appeal, the judgment of the district court was reversed, the United States Circuit Court of Appeals for the Fifth Circuit holding that while a receiver appointed by a United States court is an officer of the court, nevertheless Judicial Code §33 as amended applies only to actions and proceedings brought against a receiver personally, and has no application to cases brought against him in his representative capacity where a money judgment is sought to be recovered that will be paid out of the receivership estate. The court ordered the dismissal vacated, and the case remanded to the state court (R. 30).

Specific Assignments of Error to be Urged

The errors which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit are:

1. The court erred in reversing the judgment of the district court, and in holding that Judicial Code §33 as amended applies to actions and proceedings brought against a receiver, i. e., an officer of the courts of the United States, only where it is sought to hold him responsible in his own person or property; and the court erred in holding that the section does not apply to cases brought against him in his representative capacity where, in case of a money judgment, it would be payable out of the receivership estate.

2. The court erred in holding that the section invoked by the receiver was without application to this suit, and that the remand was improperly denied and that the suit was improperly dismissed.

3. The court erred in reversing the case with directions to set aside the dismissal and to remand the cause to the state court.

Reasons for Granting the Petition

This case comes within the provisions of Rule 38 (5 b) of this court.

The Circuit Court of Appeals for the Fifth Circuit has here rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. The Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Sanborn writing the opinion, held in *Newell v. Byram*, 26 Fed. (2d) 200, 202, that a case of this character was removable under §33 of the Judicial Code, and that such removal has been

generally sustained in the courts of the United States since the decision of the cases of *Matarazzo v. Hustis*, 256 Fed. 882, 887, *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, 441, and *Berens, Jr. v. Byram, et al, Receiver*, 26 Fed. (2d) 953.

See also, in addition to cases cited by Judge Sanborn, *American Locomotive Co., et al, v. Histed*, 18 Fed. (2d) 656, *Newell v. Byram*, 18 Fed. (2d) 657, *Elliott v. Wheelock*, 34 Fed. (2d) 213, and *Snider v. Sand Springs Ry.*, 62 Fed. (2d) 635, 636. In Snider's case removal was allowed, and *Newell v. Byram, supra*, was cited apparently with approval by the Circuit Court of Appeals for the Tenth Circuit.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided a federal question in a way probably in conflict with applicable decisions of this court, and particularly with the decision in *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, where, under similar circumstances, it is contended this court held that a suit against a receiver of a court of Alaska, and another, to recover money in a bank and certain property in the hands of the receiver, because of the wrongful acts of a predecessor receiver, was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, for that all the courts

of the United States having the question under consideration, with the single exception of District Judge Reeves of the Western District of Missouri, who held to the contrary in *Slover v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. (2d) 609, have held that such cases are removable under Judicial Code §33 as amended, where the judgment recovered will be payable out of the receivership estate, and until the decision of the case at bar the practice of removal in cases of this kind has been uniformly recognized and followed throughout the country.

The Circuit Court of Appeals for the Fifth Circuit in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Many cases removed under the statute are pending in the federal courts at this time. They are scattered throughout the country, and their proper disposition is now involved in doubt, by reason of this decision. See, in this connection, petition for mandamus, rule nisi thereon returnable January 8th, 1934, and Brief in support thereof, Ex parte: in the matter of L. W. Baldwin and Guy A. Thompson, et al. petitioners, filed in this court on December 11th, 1933.

The result of the decision of the Circuit Court of Appeals for the Fifth Circuit is to leave this whole subject in considerable confusion. In the Eighth and Tenth Circuits, removal under identical facts apparently will be allowed. Before certain District Judges

in the Second Circuit, certainly as to those who agree with the opinion of District Judge Ray, of the Northern District of New York in *Matarazzo v. Hustis, supra,* removal of cases like this will be allowed, whereas among judges who agree with the reasoning of the Court of Appeals in this case removal will be denied, even though the facts in the several cases may be identical. In Circuits other than the Eighth, Tenth and Fifth, the District Judges hereafter will find themselves presented with conflicting decisions among the Circuits and the District Judges, and the proper interpretation of the statute will remain uncertain.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

December 1933.

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No.....

CHARLES E. GAY, Jr., Receiver of Savannah & Atlanta Railway,
Petitioner,

v.

MAJOR RUFF,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions of the Courts Below

The District Court's opinion will be found on pages 11 to 16 of the record and is reported in 3 Fed. Supp. 264. The opinion of the Circuit Court of Appeals (R. 25-30) has not been reported.

Jurisdiction

As stated in the petition, the judgment of the Circuit Court of Appeals to be reviewed was entered November 15, 1933 (R. 25). The jurisdiction of this court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. §347 (a).

It may be suggested that under Judicial Code §28 as amended (28 U. S. C. §71) providing if the district court upon removal shall decide that a cause was improperly removed, and order it remanded, the remand shall be immediately carried into execution, and no appeal or writ of error from the district court allowed, or because the judgment of the Circuit Court of Appeals in this case is not final, this court is without jurisdiction to grant a writ of certiorari in this case; and *German National Bank v. Speckert*, 181 U. S. 405, and subsequent cases citing it, may be relied upon to support this argument.

If this argument should be advanced,—and opposing counsel have informed us they will so contend—we direct the court's attention to the fact that the *Speckert* and other similar cases, as well as Judicial Code §28, all deal with writs of error or appeals and not with writs of certiorari. Review was denied in the *Speckert* case because the order for remand was not a final judgment. That is all that was decided. By §6 of the Act of March 3, 1891, c. 517, 26 Stat. 828, which was then of force, the remedy of appeal or writ of error existed as a matter of right, where the matter in controversy exceeded $1,000.00 besides costs, only in cases not by the section made final, and as the law then stood such appeal or writ of error could only be taken from a final judgment. And this court held that an order of remand was not a final judgment. The writ of certiorari was not then available to the appellant, for it only issued in cases made final in the Circuit Court of Appeals by

the Act of March 3, 1891 (i. e., cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States, cases arising under patent, revenue and criminal laws, and admiralty cases). 26 Stat. 826; U. S. Comp. Stat. (1901), page 550. The controlling statutes, however, as to appeals, writs of error and writs of certiorari have been greatly changed since the *Speckert* case was decided. The case ruled nothing at the time as to the remedy of certiorari, and *a fortiori* it can not be considered as authority now when the statute granting the remedy of certiorari, as hereinafter pointed out, has been greatly changed.

As to the finality of the judgment, this question was put at rest, it seems to us, in *United States v. Gulf Refining Co.*, 268 U. S. 542, 544, 545. See also *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 372, 385; *Forsyth v. Hammond*, 166 U. S. 506, 513. The words "in which the judgment or decree of the Circuit Court of Appeals is made final," etc., theretofore appearing in §240 of the Judicial Code, were stricken from it by the Act of February 13, 1925. Even before the Act of 1925, and while the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157, was of force, the judgment to be reviewed on certiorari only must have related to cases in which the Acts of Congress made the judgment of the court final, not necessarily to cases in which the court has rendered a final judgment (*American Construction Co. v. Jacksonville Ry., supra*, p. 384-5), but

under the law as it now stands the right of certiorari seems to exist in any case, civil or criminal, in a Circuit Court of Appeals, upon the petition of any party thereto, without regard to finality of judgment in either sense.

Under the Act of February 13, 1925, as now embodied in Judicial Code §240 (a), this court has power to "require by certiorari, . . . any case, civil or criminal, in a circuit court of appeals . . . upon the petition of any party thereto . . . either before or after judgment . . . be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Of course, the words "power and authority" and "with like effect" etc., qualify only the determination of the case on the merits after the certiorari is granted and were never intended to, and do not, qualify or restrict this court's power to grant the writ.

The statute with respect to no appeal or writ of error being allowed from an order remanding a case to the state court is part of §28, and not of §33, of the Judicial Code, and the privileges and proceedings under the two sections are quite different.

The statute forbidding an appeal or writ of error, as contained in §28 of the Judicial Code, in terms relates to orders of the district courts and not of the Circuit Courts of Appeal. The district court has not decided the case should be remanded; no order of remand has

been made. The Court of Appeals has merely directed that such order be entered. The statute, therefore, is not applicable.

And lastly, as stated, the statute with respect to this court's jurisdiction on certiorari was greatly altered and enlarged by the Act of March 13, 1911, c. 231, 36 Stat. 1087, 1157, and by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938.

It would be an anomalous situation if because of the statutory provision prohibiting an appeal or writ of error from the judgment of a district court remanding a case to a state court, removed under §28 of the Judicial Code (if that prohibition applies also to §33), this court found itself unable to settle the conflict between the different Circuit Courts of Appeals of the country as to the proper interpretation to be given to §33 of the Judicial Code as amended by the Act of August 23, 1916, quoted in the petition. It may be that mandamus will not lie, in a civil case of this character, to require the district court after removal and remand to retain jurisdiction (*Ex Parte Harding*, 219 U. S. 363; *Ex Parte Roe*, 234 U. S. 70; *Ex Parte Matthew Addy S. & C. Corp.*, 256 U. S. 417). Only where the exceptional character of the proceedings to be reviewed justifies and the absence of any other remedy is shown, will this court take jurisdiction under mandamus proceedings (*Maryland v. Soper*, 270 U. S. 9, 28).

If mandamus will not lie, and the judgment here can not be reviewed on certiorari, then, notwithstanding

the conflict of decisions in the different Circuit Courts of Appeals of the country, and the fact that the Circuit Court of Appeals has here probably failed to follow the decisions of this court and the weight of other authority, this court will have to wait until some case arises where jurisdiction has been retained in the United States Court under §33 of the Judicial Code and the plaintiff in the case after final judgment seeks a review (*Wilson v. Republic Iron Co.*, 257 U. S. 92); and, meanwhile, confusion must be allowed to go uncontrolled by the only court which can reconcile the conflicts.

Statement

A statement of the facts and of the questions presented and copies of the applicable statute will be found in the preceding petition.

ARGUMENT

That the petitioner is an officer of a United States court, and under the allegations of the complaint was carrying on his duties as an officer of the court in the conduct of the business of the railway at the time of the alleged wrong, was conceded in this case by the Circuit Court of Appeals. The court said this "goes, we think, without saying" (R. 26). The court, however, laying undue emphasis, we submit, upon *McNulta v. Lockridge*, 141 U. S. 327, and certain expressions in H. R. 776, 64th Congress, 1st session, when the amendment of August 23, 1916 to Judicial Code §33 was under consideration by the House of Representatives,

held the case was not removable because the action does not proceed against the receiver personally and there is no effort to hold him responsible for the alleged tort in his own person or property.

I.

The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

It is obvious that the decision in this case conflicts with that of the United States Circuit Court of Appeals for the Eighth Circuit in *Newell v. Byram*, 26 Fed. (2d) 200, in which the opinion was written by Circuit Judge Sanborn. In both cases suit was brought against a receiver of a railway for the alleged negligent acts of his agent in operating trains, judgments were asked against the receivership estate, the cases were removed from the state to the federal courts, motions to remand were made and denied in the district courts, and in one case the Circuit Court of Appeals held the case removable and in the other case that it was not. The argument adopted by Judge Hutcheson in the case at bar was advanced in the Newell case but was rejected in the following language:

> "It was the Congress of the United States that prescribed in §33 of the Judicial Code the terms and conditions of the removability of the action in hand. Neither court nor counsel may lawfully add to, subtract from or change those terms and conditions."
>
> *Newell v. Byram*, 26 Fed. (2d) 201.

The decision in this case probably also conflicts with the views of the Circuit Court of Appeals for the Tenth Circuit as indicated in *Snider v. Sand Springs Ry.*, 62 Fed. (2d) 635, 636. We recognize that so far as the reported decision shows no issue was made as to the right of removal in the *Snider* case. However, if the Circuit Court of Appeals for the Tenth Circuit had thought the case improperly removed, even in the absence of a motion to remand, the case should have been sent back to the state court under Judicial Code §37, 28 U. S. C. §80.

II.

The Circuit Court of Appeals for the Fifth Circuit has decided a federal question in this case in a way probably in conflict with applicable decisions of this court.

The case at bar seems to us controlled by *Barnette v. Wells Fargo Bank*, 270 U. S. 438. In that case the suit was originally brought in the state court against the receiver of a bank in Alaska, holding his appointment under an order from a United States court, to recover certain money in a bank and property charged to have been taken into possession by fraud and duress of a predecessor receiver. While the record was incomplete as to the ground of removal, this court, in the majority opinion, nevertheless said:

> "Such a suit was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916 c. 390, 39 Stat. 532. *Matarazzo v. Hustis*,

256 Fed. 882, 887-9; see *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 603; *Board of Commissioners v. Peirce*, 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska, with reference to land located in Alaska, in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse v. Hornsby*, 161 U. S. 588, 590."

Reference will be made hereafter to *Matarazzo v. Hustis*, cited apparently with approval by this court.

See *Rose's Federal Jurisdiction & Procedure*, (3rd ed), §383, p. 358.

The Circuit Court of Appeals in this case attempts to distinguish the Barnette case by suggesting that the majority opinion dealt with a purely "suppositious" case, and is, therefore, not binding as a precedent. It is said, "It can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally, or 'against the corporation in his name'." (R. 30).

The case can not be put aside so lightly. It is true it did not affirmatively appear on what ground the removal was sought, allowed and sustained in the *Barnette* case, but the majority opinion clearly shows (pages 440, 441) that the suit was for the surrender and cancellation of a deed to land and to recover money deposited by the receiver in a bank, joined as

party defendant, which was derived from rents and from a sale of some of the land. It is perfectly clear, it seems to us, that there was no effort to hold the defendant receiver liable in his own person or property. Whatever money judgment might have been recovered would have been payable out of the receivership estate or, if the funds in bank were not part of the receivership estate, the limit of the recovery would have been to subject the particular fund in controversy. There can certainly be no presumption that an effort was made to hold the successor receiver personally liable when the reported facts show all he did was to receive the money from his predecessor receiver, leave it in a bank, and hold certain deeds that were turned over to him by his predecessor.

Moreover, it was the duty of this court to examine into the question of jurisdiction of its own motion. *Chicago, Burlington & Quincy Ry. v. Willard,* 220 U. S. 413. Under Judicial Code §37, 28 U. S. C. §80, if it shall appear to the satisfaction of a district court at any time after a suit has been brought or removed thereto that jurisdiction is lacking the case shall be dismissed or remanded as the situation may require.

Matarazzo v. Hustis, a decision by District Judge Ray, of the Northern District of New York, reported in 256 Fed. 882, was cited apparently with approval by this court in the *Barnette* case, clearly showing that the holding of the majority opinion was not a purely "suppositious" one but that due consideration was given to the same reasoning the Circuit Court of Ap-

peals adopted in the instant case in support of a denial of jurisdiction. This court even refers to pp. 887-889 where Judge Ray discussed the history of the amendment of August 23, 1916 of §33 of the Judicial Code and where he concluded by saying:

> "A receiver appointed by the courts of the United States by this amendment was put on the same footing with officers created by statute and (the statute) was enacted because of conflicting decisions as to suits against receivers and their removability."

III.

The Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Before the amendment of August 23, 1916 of §33 of the Judicial Code the right of removal was limited to certain classes of officers, members of Congress, etc. By that amendment the same right of removal was given to "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in performance of his duties as such officer" (italics ours). That receivers appointed by a court of the United States are such officers, and that under the bill of complaint here the receiver was carrying out his duties as an officer of the court, is not disputed by

the Circuit Court of Appeals. The legislative purpose, as expressed in clear and unambiguous language in the amendment, was to place such officers of the courts of the United States in the same class and to grant to them the same right of removal that revenue officers, certain others, and members of Congress, theretofore enjoyed, for acts done under the color of their offices, or in the discharge of their official duties. It is a strange and strained interpretation of the words of the amendment to say that the right of removal depends upon who shall pay the judgment. It is hardly conceivable that Congress intended some suits against receivers for acts done under color of their offices or in the performance of their official duties might be removed, and other like actions brought against them in the same way might not, dependent only upon the party paying the price for the wrong. Suppose this had been a suit against a United States marshal, brought in a state court, to recover money in his hands arising from a sale of property under the revenue laws or an action of repelvin for property seized under such laws, could it be fairly argued that merely because he would not have to pay personally the amount of the recovery, the suit was not removable to the United States court? *Cleveland, etc. R. R. Co. v. McClung*, 119 U. S. 454; *Philadelphia v. Diehl*, 5 Wall. 720. If the argument would fail in a case like that against a marshal, why should it prevail in a suit against a receiver, admittedly an officer of a court of the United States, who, by the amendment of August 23, 1916, was given exactly the same right of removal that was

theretofore enjoyed by officers of the court acting by authority of the revenue laws of the United States?

The weight of authority supports the removal. In addition to *Barnette v. Wells Bank*, *Newell v. Byram*, *Matarazzo v. Hustis*, and *Snider v. Sand Springs Ry.*, supra, removal has been sustained under similar facts in the following cases:

American Locomotive Co., et al, v. Histed, 18 Fed. (2d) 656;
Newell v. Byram, 18 Fed. (2d) 657;
Elliott v. Wheelock, 34 Fed. (2d) 213.

The only decision of a court of the United States to the contrary was that of District Judge Reeves, of the Western District of Missouri, in *Slover v. Chicago M., & St. P. Ry. Co.*, 16 Fed. (2d) 609. This Judge later, recognizing the binding authority of *Newell v. Byram, et al*, of his own Circuit Court of Appeals, reluctantly receded from the position first taken by him and even went so far the other way as to hold than an action by an employee under the Federal Employers Liability Act against a federal receiver of a railway could be removed from a state court to a court of the United States, because he thought the amendment of 1916 of Judicial Code §33 impliedly repealed inconsistent provisions of the Federal Employers Liability Act. *Elliott v. Wheelock, supra.*

It will be found that *Matarazzo v. Hustis* and *Barnette v. Bank, supra*, have been consistently cited and followed as supporting removal in the cases mentioned,

without regard to the fact that final judgment would be payable out of the receivership estate and not out of the personal funds of the receiver.

In reaching the conclusion that suits against federal receivers in state courts are removable under Judicial Code §33 only when the proceedings are brought personally against the receiver and it is sought to hold him responsible in his own person or property, the Circuit Court of Appeals lays great emphasis on *McNulta v. Lockridge*, 141 U. S. 327, 331-2, in which it was incidentally said that if actions were brought against the receivership generally or against the corporation by name, in the hands of or in the possession of a receiver, without stating the name of the individual, it would more accurately represent the character and status of the defendant, as the receiver stands in the place of the corporation. The case then under consideration was an action against a receiver for acts of his predecessor, and the court was concerned with the Act of March 3, 1887 c. 373, 24 Stat. 552 (Judicial Code §66, 28 U. S. C. §125), permitting suits to be brought against receivers without previous leave of the court. That statute provides that such receiver may be sued in respect of any act or transaction "of *his* in carrying on the business connected with such property, without the previous leave of the court," and the argument was made that since it was not the act of the particular receiver of which complaint was made, the action would not lie. This court in discussing that contention said that the possession of the receiver was somewhat analogous to that of a corporation sole with respect to

which actions will lie by and against the actual incumbents for causes of action accruing under their predecessors in office. While for some purposes the receiver does stand in the place of the corporation, yet there are cases, i. e., foreclosure of mortgages covering specific property representing only a part of the mortgagor's assets, with ancillary receiverships, where the receiver only represents the corporation in so far as the mortgaged property extends. It is not accurate to say, therefore, that in all cases a chancery receiver stands in the place of the corporation for all purposes, and we respectfully submit that the McNulta case is not authority for cutting up actions against receivers and putting them in piles for removal purposes according to whether the judgment sought binds the receiver personally or only the receivership estate. No such question was before the court in the McNulta case.

The Circuit Court of Appeals also places great reliance on House Report No. 776, 64th Congress, first session, wherein it was said the proposed amendment of August 23, 1916 of Judicial Code §33, later enacted, was a recital of the old law with only one change. The change is quoted in the House Report, and that change is the statute which is now to be interpreted, viz., the addition of the words "or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." We do not contend any change was made in the old law except by the addition of these words. The Committee report said, "The pur-

pose of the proposed amendment is *to extend the provisions* of §33 uniformly *to officers of the courts* of the United States not only in cases arising under the revenue laws but *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws, and to officers of Congress." (Italics ours). The court's duty to protect the property it administers is not diminished by its obligation to vigorously protect its officers performing their duties. As much reason to grant removal exists in the one case as in the other.

The amendatory statute gave the benefits of the section not only to receivers but to clerks of the court, United States commissioners and other officers while acting in the performance of their duties, and the enlargement of the class to be granted the right of removal seemed wise to Congress, according to the Committee Report, not only to provide for a more orderly method of procedure but to prevent the anomalous condition which then existed, which, according to the Committee, "could not be justified upon any line of reasoning," whereby certain officers performing their duty under revenue laws were entitled to removal while the same officers engaged in other duties not related to revenue laws were not entitled to the right of removal.

But whatever the committee report may have shown, the language of the amendatory statute is so simple and clear in its terms, extrinsic aid for interpreta-

tion is not needed. If there were ambiguity in the statute, and if the construction placed upon it by the Circuit Court of Appeals were not contrary to its plain terms, as we read it, perhaps the committee report might be of some aid to the Court. *United States v. St. Paul & M. Ry. Co.*, 247 U. S. 310, 318. But the language of the statute is positive and clear, and can not be argued away by attenuated theories of applicability only to some particular kind of case against receivers thereby excluding others not expressly or by clear inference withdrawn from its operation. Committee reports "can not be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Their use is to 'solve, but not to create, an ambiguity.' If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *U. S. v. Shreveport Grain & E. Co.*, 287 U. S. 77, 83.

The Circuit Court of Appeals is somewhat critical of Congress if the statute is to be given the interpretation claimed for it by us. It is said that Judicial Code §33 has no relation generally to removals (R. 27), though by its plain terms that is the only thing with which it is concerned. True, it provides for removal under a different form of procedure, and under different circumstances, from the general removal statute as laid down in Judicial Code §28, but it is nonetheless a removal statute. The lower court seems to think to give it the interpretation contended for by us would in some manner reflect upon Congress; that to so construe it

would "make an unsuspected breach in the removal laws, by hiding that breach away in a secret place" (R. 28). And the court says it seems "bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code related entirely to the removal of suits and transactions against revenue officers, etc., a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws." (R. 27). We are quite unable to get this point of view. Minds may differ as to whether Judicial Code §28 or §33 is the more appropriate place for an amendment like this, both sections dealing with removal of causes, but surely neither is a "secret place" and amending either creates no "unsuspected breach" in removal laws. To our way of thinking amending §33 was the right way to go about it, for Congress meant to enlarge the class of officers there enumerated who would be granted the right of removal, and did so, by plain and unmistakable language, in "*any* civil suit" commenced "in *any* court of a state" against "*any* officer of the courts of the United States" because "of *any* act done under color of his office, or in the performance of his duties as such officer."

The Circuit Court of Appeals seems to have been influenced also in this case by the thought that Congress is disposed to restrict federal jurisdiction, saying "for fifty years its policy has been to restrict, not to enlarge, federal jurisdiction" (R. 26). The fact is, however, that Judicial Code §33, which can trace its parentage

to the Act of March 2, 1833, 4 Stat. 633, originally designed to circumvent the so-called nullification statutes of South Carolina, from time to time as amended has greatly enlarged the jurisdiction of United States courts, and has taken in additional classes who might avail themselves of a right of removal; and the policy of the courts has been to give liberal construction to the provisions of the section. *Tennessee v. Davis*, 100 U. S. 257, 268; *Davis v. South Carolina*, 107 U. S. 597; *Maryland v. Soper*, 270 U. S. 9-10 (3); *Colorado v. Symes*, 286 U. S. 510, 517; *Ward v. Congress Construction Co.*, 99 Fed. 598, 604-605.

We have found no case construing this statute, except the Slover case already mentioned, where the distinction here made by the Circuit Court of Appeals has been recognized.

IV.

Conclusion

We think it sufficiently appears the questions presented in this case are of such a nature as to justify the assertion that the case comes within the provisions of paragraph 5 b of Rule 38, which states the considerations controlling in the matter of issuing writs of certiorari in cases like this, and it is respectfully submitted that the petition should be granted.

Respectfully submitted,

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.

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CHARLES ELMORE CR
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Supreme Court of the United States

OCTOBER TERM, 1933

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY,
Petitioner,

vs.

MAJOR RUFF,
Respondent.

No. 663

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

BRIEF FOR PETITIONER

ROBERT M. HITCH,
ARCHIBALD B. LOVETT,
Savannah, Georgia,
For Petitioner.

Review Printing Co.

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Supreme Court of the United States

OCTOBER TERM, 1933

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY,
Petitioner,
vs.
MAJOR RUFF,
Respondent.

No. 663

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

BRIEF FOR PETITIONER

Statement of the Case

Major Ruff, respondent, brought suit for damages in a State court in Georgia against Gay, the receiver of the railway, alleging that his son was killed through the negligent operation of one of the railway's trains. It appears from the bill of complaint that the receiver was appointed by the District Court of the United States for the Southern District of Georgia, in the exercise of its equity powers, and continuously since his appointment has been carrying on the business of the railway, including the operation of trains. It was alleged that "while so engaged in operating said rail-

road property as said receiver, the said defendant injured and damaged plaintiff by reason of the facts hereinafter alleged" (R. 1).

The case was removed by the receiver to the District Court of the United States for the Southern District of Georgia, in the appropriate Division, acting under the authority of U. S. Judicial Code §33, as amended (R. 8). Respondent filed a motion to remand, which was overruled, the District Court holding in view of the allegations and the decisions hereinafter referred to that the receiver was "an officer of the courts of the United States," and that the action was "for or on account of an act done under color of his office or in the performance of his duties as such officer" (R. 11; 3 Fed. Supp. 264, 265). Later, the case was dismissed for want of prosecution (R. 17).

On appeal, the judgment of the District Court was reversed by the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court thought that while a receiver appointed by a United States court was an officer of the court, nevertheless Judicial Code §33 as amended applied only to actions and proceedings against the receiver personally, and had no application to cases brought against him in his representative capacity where a money judgment was sought to be recovered that would be paid out of the receivership estate. The dismissal was ordered vacated and direction was given that the case be remanded to the State court (R. 30).

Petitioner in due time applied to this court for a writ of certiorari to review the decision of the Circuit Court of Appeals, and on January 15, 1934 the writ was granted and the case assigned for argument.

Assignments of Error

The assignments of Error in the petition for certiorari are as follows:

> "1. The court erred in reversing the judgment of the district court, and in holding that Judicial Code §33 as amended applies to actions and proceedings brought against a receiver, i. e., an officer of the courts of the United States, only where it is sought to hold him responsible in his own person or property; and the court erred in holding that the section does not apply to cases brought against him in his representative capacity where, in case of a money judgment, it would be payable out of the receivership estate.
>
> "2. The court erred in holding that the section invoked by the receiver was without application to this suit, and that the remand was improperly denied and that the suit was improperly dismissed.
>
> "3. The court erred in reversing the case with directions to set aside the dismissal and to remand the cause to the state court."

Opinions of the Courts Below

The District Court's opinion will be found on pp. 11 to 16 of the record, and is reported in 3 Fed. Supp. 264. The opinion of the Circuit Court of Appeals will be found on pp. 25 to 30 of the record, and is reported in 67 Fed. (2d) 684.

Jurisdiction

The jurisdiction of this court has been invoked under §240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. §347 (a).

Jurisdiction was discussed at some length in the brief filed in support of the petition for certiorari (pp. 10 to 14) and since the writ has been granted the discussion will not be repeated.

Statute Involved

The pertinent language of Judicial Code §33 as amended by the Act of August 23, 1916 is:

> "When any civil suit or criminal prosecution is commenced in any court of a state against . . . any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer . . . said suit . . . may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . ."

28 U. S. C., §76; R. S. §643 as amended.

Question Presented

The question arising on writ of certiorari is whether a suit against a receiver, appointed by a United States Court, in charge of the operation of a railroad, to recover damages from the receivership estate for the alleged negligent acts of his agents operating trains, is removable from a State to a Federal court, under the statute just quoted, or whether the statute applies only to suits or prosecutions brought against the receiver for official conduct where it is sought to hold him responsible in his own person or property.

ARGUMENT

POINT I.

The decision complained of departs from the statute, and is in conflict with prior decisions of this court and other courts.

Heretofore the courts of the country generally have sustained the right of removal by a federal receiver. They followed the statute. Congress made no distinction between cases where judgment was sought against the receiver personally and those where judgment was sought against him in his representative capacity. The Congress is presumed to have said what it meant. If it had intended to authorize any such distinction presumably it would have said so. The court below was unauthorized, either by statute or by earlier decisions of this court and of other courts, to originate any such distinction and thereby amend the statute. *Barnette v. Wells Fargo National Bank*, 270 U. S. 438, 441; *Newell*

v. Byram (C. C. A., 8th), 26 Fed. (2d) 200; *Snider v. Sand Springs Ry.* (C. C. A., 10th), 62 Fed. (2d) 635; *Matarazzo v. Hustis*, 256 Fed. 882, 887; *American Locomotive Co., et al. v. Histed*, 18 Fed. (2d) 656; *Newell v. Byram*, 18 Fed. (2d) 657; *Berens, Jr. v. Byram, et al.*, 26 Fed. (2d) 953; *Elliott v. Wheelock*, 34 Fed. (2d) 213; *Wegman v. Traders' Nat. Bank*, 220 N. Y. S. 476, 129 Misc. Rep. 132.

In the *Barnette* case, the suit was originally brought in the state court against a receiver of a bank in Alaska, holding his appointment under an order from the United States Court, to recover certain money in a bank and certain property charged to have been taken into possession by fraud and duress of the predecessor receiver. In that case it was decided by this court that:

> "Such a suit was removable under §28 of the Judicial Code as supplemented by the amendment of §33 by the Act of August 23, 1916, c. 390, 39 Stat. 532. *Matarazzo v. Hustis*, 256 Fed. 882, 887-9; see *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 603; *Board of Commissioners v. Peirce*, 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska, with reference to land located in Alaska, in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse v. Hornsby*, 161 U. S. 588, 590."

While there was a dissent in the *Barnette* case, the division among the members of this court was not due to any difference of opinion with respect to the removability of the action. The minority dissented only because, in the absence of a full record, they were unwilling to indulge the presumption that the removal had been obtained under the statute here involved, Judicial Code §33.

The Circuit Court of Appeals in the case at bar attempts to distinguish the *Barnette* case by suggesting that the majority opinion dealt with a purely "suppositious" case, and is, therefore, not binding as authority. It was said, "It can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally or 'against the corporation in his name'." (R. 30). The case can not be put aside so lightly. That the suit was brought against the receiver and others clearly appears from the reports of the case in the lower courts. 277 Fed. 110, 111; 298 Fed. 689. The Wells-Fargo Bank, not in receivership, was joined as a defendant only because the receiver had deposited certain funds in it. It is true it did not affirmatively appear on what ground removal was sought, allowed, and sustained, but the majority opinion clearly shows (pp. 440, 441) that the suit was for the surrender and cancellation of a deed to land and to recover money deposited by a receiver in a bank, joined as a party defendant, which was derived from rents and from a sale of some of

the land. It seems clear from the reported decisions that there was no effort to hold the defendant receiver liable in his own person or property. Whatever money judgment might have been recovered would have been payable out of the receivership estate, or if the funds in bank were not a part of the receivership estate, the limit of the recovery would have been to subject the particular fund in controversy. There can certainly be no presumption that an effort was made to hold the successor receiver personally liable when the reported facts show that all he did was to receive the money from his predecessor receiver, leave it in a bank, and hold certain deeds that were turned over to him by his predecessor.

Moreover, it was the adjudicated duty of this court to examine into the question of jurisdiction of its own motion. *Chicago, Burlington & Quincy Ry. v. Willard*, 220 U. S. 413. Under Judicial Code §37, 28 U. S. C., §80, if it had appeared to the satisfaction of the District Court that jurisdiction was lacking the case should have been dismissed or remanded as the situation required.

In *Matarazzo v. Hustis, supra*, cited apparently with approval by this court in the *Barnette* case, District Judge Ray considered and discarded the same reasoning the Circuit Court of Appeals adopted in the instant case. The citation of that case by this court shows, we think, that the majority opinion was not a purely "suppositious" one. This court even referred to pages 887-

889, where Judge Ray discussed the history of the amendment of August 23, 1916 of §33 of the Judicial Code, which amendment enlarged the class of officers entitled to removal by including "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in performance of his duties as such officer" and where he concluded by saying:

> "A receiver appointed by the courts of the United States by this amendment was put on the same footing with officers created by statute and (the statute) was enacted because of conflicting decisions as to suits against receivers and their removability."

In *Newell v. Byram*, *supra*, the argument to which Judge Hutcheson yielded in the instant case was advanced but was rejected by the Circuit Court of Appeals for the eighth Circuit, speaking through Judge Sanborn, in the following language:

> "It was the Congress of the United States that prescribed in §33 of the Judicial Code the terms and conditions of the removability of the action in hand. Neither court nor counsel may lawfully add to, subtract from or change those terms or conditions."
>
> *Newell v. Byram*, 26 Fed. (2d) 201.

The Circuit Court of Appeals for the tenth Circuit, in *Snider v. Sand Springs Ry.*, *supra*, allowed removal of a similar case and cited with approval *Newell v. Byram, supra*. We recognize that so far as the reported

decision shows no issue was made as to the right of removal in the *Snider* case. However, if the Circuit Court of Appeals had thought the case improperly removed, even in the absence of a motion to remand, the case would have been sent back to the state court under Judicial Code §37, 28 U. S. C. §80.

The other cases to which we have referred are District Court and State court decisions. Removal was allowed in each of them. No distinction was made upon the ground that removability depended upon how or by whom the judgment should be paid.

There are many other decisions of the United States District Courts to the same effect which have not been printed or published (26 Fed. (2d) 202). See application for mandamus in the matter of L. W. Baldwin and Guy A. Thompson, Trustee, et al., petitioners, now pending in this Court, with Brief in support thereof, and applications of other parties at interest for leave to file briefs in this cause.

The only reported decision of a court of the United States besides this case which has denied the right of removability where the judgment is payable out of the receivership estate is *Slover v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. (2d) 609, decided by District Judge Reeves, of the Western District of Missouri. At first, he was of the opinion that only those cases could be removed where the action sought to hold the receiver personally liable. Later, however, recognizing the binding authority of *Newell v. Byram, supra*, of his

own Circuit Court of Appeals, he reluctantly receded from the position first taken by him and even went so far the other way as to hold that an action by an employee under the Federal Employers' Liability Act against a federal receiver of a railway could be removed from the state court to a court of the United States, because he thought the amendment of 1916 of Judicial Code §33 impliedly repealed inconsistent provisions of the Federal Employers' Liability Act. *Elliott v. Wheelock*, 34 Fed. (2d) 213.

In the court below *Hartman v. Fleming* (Mo.), 264 S. W. 873 (2), 874 and *Knapp v. Byram*, 21 Fed. (2d) 226, were cited as opposing the views expressed in the cases already mentioned. An examination of these cases discloses that in the *Hartman* case the United States District Court dismissed the certiorari and remanded the case. All that the Supreme Court of Missouri held was that the action of the District Court was authoritative and conclusive under the decision of this court in *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, in which it was held that if the District Court remands a case and the state court thereupon proceeds to final judgment, the action of the District Court is not reviewable on writ of error to such judgment. In the *Knapp* case, a decision by three judges sitting in the District Court, it was merely held that the provision of the Federal Employers' Liability Act as amended (45 U. S. C. §56), denying the right of removal to a federal court of actions arising under the Act and brought in the state court, was not repealed by im-

plication by Judicial Code §33 as amended in 1916, the court thereby differing with District Judge Reeves, who held to the contrary, as stated, in *Elliott v. Wheelock, supra.*

POINT II.

The removal statute being plain, there is no room for construction.

Before the amendment of August 23, 1916 of §33 of the Judicial Code the right of removal was limited to certain revenue officers, persons acting under their authority or under revenue laws or on account of right, title, etc., claimed under such laws, to persons holding property or estate by title derived from any such officer and affecting the validity of revenue laws, and to officers of either house of Congress. By that amendment the same right of removal was given to "*any* officer of the courts of the United States for or on account of *any* act done under color of his office or in the performance of his duties as such officer."

That receivers appointed by a court of the United States are such officers, and that under the bill of complaint here the receiver was carrying out his duties as an officer of the court, is not disputed by the Circuit Court of Appeals. Indeed, the court said this "goes, we think, without saying," (R. 26). The court nevertheless, seeking extrinsic aid for interpretation through congressional reports (H. R. No. 776, 64th Congress, 1st session), concludes that Congress must have meant to grant the right of removal to federal receivers only

when it is sought to bind them in their own person or property. But if so, why didn't the Congress say so?

The legislative purpose, as expressed in clear and unambiguous language in the amendment, was to place "*any* officer of the courts of the United States" in the same class with revenue officers, certain others, and members of Congress, and to grant him the same right of removal those officers theretofore enjoyed for acts done under color of their offices or in the discharge of their official duties.

It is a strange and strained interpretation of the words of the amendment, and amounts to a judicial amendment, to say that the right of removal depends upon who shall pay the judgment. The section was given no such interpretation before the amendment of 1916. It is hardly conceivable that Congress intended some suits against receivers for acts done under color of their offices or in the performance of their official duties might be removed, and other like actions brought against them in the same way might not, dependent only upon the party paying the price for the wrong.

Congress *could* have easily provided in the Act of August 23, 1916, if it had desired, that *not every* civil suit against the officers designated might be removed but *only those* in which the action was brought against the officer *to hold him personally responsible for a wrong*. However, it did *not* limit the kind of suits against those officers which it declared to be subject to removal by certiorari.

The words which the Congress omitted from the statute are as significant as those which it used. Both indicate a clear purpose by the law-making power that the amendatory Act, as applied to federal receivers, should protect the jurisdiction of a coordinate branch of the federal government, to the end that its power to conserve a property for the general good might not be frittered away for particular uses in another jurisdiction.

In the House Report mentioned, the Committee said: "The purpose of the proposed amendment is *to extend the provisions* of §33 *uniformly* to *officers of the courts* of the United States not only in cases arising under the revenue laws but *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws and to officers of Congress" (Italics ours). Congress must have thought the court's duty to protect the property it administers was not diminished by its obligation to vigorously protect its officers performing their duties. As much reason to grant removal exists in the one case as in the other.

The amendatory statute gave the benefits of the section not only to receivers but to clerks of court, United States Commissioners and other officers while acting in the performance of their duties; and the enlargement of the class to be granted the right of removal seemed wise to Congress, according to the committee report, not only to provide for a more orderly method of procedure but to prevent the anomalous

condition which then existed, which, according to the committee, "could not be justified upon any line of reasoning," whereby certain officers performing their duty under revenue laws were entitled to removal while some officers engaged in other duties not related to revenue laws were not entitled to the right of removal.

But whatever the committee report may have shown, the language of the amendatory statute is so simple and clear in its terms, aid for interpretation is not needed. If there were ambiguity in the statute, and if the construction placed upon it by the Circuit Court of Appeals were not contrary to its plain terms, as we read it, perhaps the committee report might be of some aid to the court. But the language of the statute is positive and clear, and can not be argued away by attenuated theories of applicability only to some particular kind of case against receivers, thereby excluding others not expressly or by clear inference withdrawn from its operation.

Committee reports "can not be resorted to for the purpose of construing a statute contrary to the natural import of its terms. Their use is to 'solve,' but not to create, an ambiguity.' If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *United States v. Shreveport Grain & E. Co.*, 287 U. S. 77(4), 83. See also *U. S. v. St. Paul & M. Ry. Co.*, 247 U. S. 310, 318; *U. S. v. Fisher*, 2 Cranch. 358; *Merritt v. Welsh*, 104 U. S. 694, 702, 705; *U. S. v. Mo. Pac. R. R.*, 278 U. S. 269; *U.*

S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 273; *Old Colony R. R. v. Commr. Int. Revenue*, 284 U. S. 552, 560; *Lynch v. Allworth-Stevens Co.*, 267 U. S. 364, 370; *Board of Lake Co. Commrs. v. Rollins*, 130 U. S. 662, 666-7; *U. S. v. Ewing*, 181 U. S. 140, 149; *Penn. R. R. Co. v. Int. Coal Mining Co.*, 230 U. S. 184, 199; *U. S. v. Lexington Mill & E. Co.*, 232 U. S. 399, 409-10; *U. S. v. First Natl. Bank*, 234 U. S. 245, 258-60; *Mackenzie v. Hare*, 239 U. S. 299, 306; *Caminetti v. U. S.*, 242 U. S. 470, 485; *R. R. Com. v. C. B. & Q.*, 257 U. S. 563, 589; *Standard Fashion Co. v. Margraf-Houston Co.*, 258 U. S. 346, 356; *Mason v. U. S.*, 260 U. S. 545, 554; *Russell Motor Car Co. v. U. S.*, 261 U. S. 514, 522-23; *Commr. of Immigration v. Gottlieb*, 265 U. S. 310, 313; *Van Camp v. American Can Co.*, 278 U. S. 245, 253-4; *Hamilton v. Rathbone*, 175 U. S. 414, 419, 421.

In reaching the conclusion that suits against federal receivers in state courts are removable under Judicial Code §33 only when the proceedings are against the receiver personally and it is sought to hold him responsible in his own person or estate, the Circuit Court of Appeals in this case lays great emphasis on *McNulta v. Lochridge*, 141 U. S. 327, 331-2, in which it was incidentally said that if actions were brought against the receivership generally or against the corporation by name, in the hands of or in the possession of a receiver, without stating the name of the individual, it would more accurately represent the character and status of the defendant, as the receiver stands in the place of the corporation.

The case then under consideration was an action against a receiver for acts of his predecessor, and the court was concerned with the Act of March 3, 1887, c. 373, 24 Stat. 552 (Judicial Code §26, 28 U. S. C. §125), permitting suits to be brought against receivers without previous leave of the court. That statute provides that such receiver may be sued in respect of any act or transaction "of *his* in carrying on the business connected with such property, without the previous leave of the court," and the argument was made that since it was not the act of the particular receiver, of which complaint was made, the action would not lie. This court in discussing that contention said that the possession of the receiver was somewhat analogous to that of a corporation sole with respect to which actions will lie by and against the actual incumbents for causes of action accruing under their predecessors in office. While for some purposes the receiver does stand in the place of the corporation, yet there are cases, i. e., foreclosures of mortgages covering specific property representing only a part of the mortgagor's assets, with equity receiverships, where the receiver represents the corporation only in so far as the mortgaged property extends. It is not accurate to say, therefore, that in all cases a chancery receiver stands in the place of the corporation for all purposes. The *McNulta* case must be considered, of course, in the light of the facts then being considered. It had nothing to do with removal proceedings. The only point for decision was whether or not a successor receiver could be sued for

the wrongs of his predecessor, without previous leave of the court, under the Act of March 3, 1887. The case is not authority for cutting up actions against receivers and putting them in piles for removal purposes according to whether the judgment sought binds the receiver personally or only the receivership estate. No such question was before the court in the *McNulta* case.

The *McNulta* case gives no support for writing into Judicial Code §33, by construction, an exception not made in the Act itself as to the classes of cases against federal receivers, for acts done under color of their offices or in the performance of their duties as such officers, which can be removed from a state to a federal court. To impose such an exception on the statute, we submit, violates its plain terms.

POINT III.

The history of the statute clearly shows that the right of removal has never depended upon how a judgment should be paid.

The Circuit Court of Appeals, making some reference to the history of Judicial Code §33, states that for fifty years the policy of Congress has been to restrict, not to enlarge, federal jurisdiction. The history of this statute goes much farther back than fifty years, and if one traces its evolution it will be found that jurisdiction not only has not been restricted by the several amendments but, on the contrary, has been greatly enlarged.

The origin of the statute as we now have it may be found in the so called Force Bill, the Act of March 2, 1833 (4 Stat. 633), and was brought about by the attitude of South Carolina with respect to certain revenue laws of the United States then in force. Although as early as the Judiciary Act of 1789 (1 Stat. 73) and in later statutes (3 Stat. 195; 3 Stat. 231; 3 Stat. 396), some of which expired at the termination of the War of 1812, others by their own limitations, restricted rights of removal were granted, it was the Act of March 2, 1833 which first contained provisions for the removal of suits into federal courts by certain federal officers on presentation of petitions to the federal court itself, without bond or reference to the amount in controversy. The procedure was almost precisely that which is now provided in Judicial Code §33. The principal difference is that the class of officers entitled to removal by Acts of Congress since 1833 has been considerably enlarged.

In these early statutes the controlling thought was to preserve the supremacy and integrity of the laws of the United States for the enforcement of revenue. Protection to the person or property of the officers was only incidental and secondary.

The Act of March 3, 1863 (12 Stat. 755) gave the right of removal to certain military officers, enlarging the class to whom the privilege was granted. The same may be said of the Act of June 30, 1864, §50 (13 Stat. 218). The Act of July 27, 1868 (15 Stat. 226) further

enlarged the class by extending it to certain corporations organized under the laws of the United States requiring, however, filing of a somewhat different petition and a bond in the state court.

The Act of February 28, 1871 (16 Stat. 433) further enlarged the class entitled to invoke removal, and adopted the procedure set out in the Act of 1833. The purpose of this Act was to carry into effect and enforce the provisions of the Fifteenth Amendment. By the Act of March 3, 1875 (18 Stat. 101) officers of Congress were given the right of removal.

And finally by the Act of August 23, 1916 (39 Stat. 532) the right of removal was made to include *any* officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer.

If the history of the statute is to be considered in determining whether or not the right of removal shall be granted only where the person or property of the officer is to be affected, it will be found that before the Act of 1916 no such effect was ever considered determinative. For example, in suits against Collectors of Internal Revenue, where by statute (12 Stat. 741; 28 U. S. C. §842) if a recovery is had and the court certifies there was probable cause for the Collector's action, etc., the judgment is paid out of the treasury of the United States, the right of removal has been continuously recognized by this court. *Philadelphia v. Collector*, 5 Wall. 720; *Venable v. Richards*, 105 U. S.

636; *Downes v. Bidwell*, 182 U. S. 244, 248. See also *Cincinnati Brewing Co. v. Bellman, Collector*, 102 Fed. 16; *Schafer v. Craft, Collector*, 144 Fed. 907; *Coggill v. Lawrence*, 2 Blatchf. 304, 6 Fed. Cas. No. 2,957; *Field v. Schell*, 4 Blatchf. 435, 9 Fed. Cas. No. 4,771; *Onondaga Salt Co. v. Wilkinson*, 8 Blatchf. 30, 21 Fed. Cas. No. 12,269; *Venable v. Richards*, 1 Hughes, 326, 28 Fed. Cas. No. 16,913.

Similarly, this court has held that a suit against a Collector of Customs in a state court in which it was complained that the Collector's deputy delivered imported goods, on which there was a lien for freight, to the consignee on receipt of the freight charges, without notifying the carrier as required by statute, and seeking to recover the money so received, has been held removable, although obviously the Collector would not have paid the judgment. *Cleveland Etc. R. R. v. McClung*, 119 U. S. 454.

A suit against a Collector of Customs for the proceeds of goods condemned as forfeited for breach of the revenue laws, brought by an informer, is held removable. The proceeds of the goods were not the property of the collector. *Van Zandt v. Montgomery*, 2 Blatchf. 421, 28 Fed. Cas. No. 16,884.

Foreign attachment proceedings in a state court, under which a United States Collector of Customs is sought to be made garnishee with respect to goods of the defendant held for duties, is held removable under

the statute though here again no question of personal liability of the Collector is involved. *Fischer v. Daudistal*, 9 Fed. 145.

Where the owner of certain distilled spirits, in the custody of the Surveyor of Customs, desiring to transfer it into packages other than those in which they were imported, because the original barrels were old, worn and decayed, upon refusal brought suit against the Surveyor praying judgment of the court ordering the defendant to permit the transfer applied for, and also for damages, the case was removed from a state to the United States court under the statute. *Thomas & Son Co. v. Barnett*, 135 Fed. 172.

A summary proceeding by a landlord to recover from a lessee possession of premises used as a bonded warehouse, to which proceeding the Collector of Internal Revenue and the United States storekeeper were made parties defendant, and described as undertenants holding over, has been held removable from the state to the federal court. No personal judgment against the officers was involved. *Gallatin v. Sherman*, 77 Fed. 337.

A suit against a corporation building a court house, to enjoin further construction, was held removable solely because such a corporation was engaged in performing a contract with the Secretary of the Treasury and was a person acting by authority of a revenue officer of the United States, given under color of his

office. There was no prayer for personal judgment against the corporation. *Ward et al. v. Congress Const. Co.*, 99 Fed. 598.

There are many other decisions of lower courts upholding removal under Judicial Code §33, before the amendment of 1916, where no consideration was given to whether the judgment sought affected the person or property of the revenue or other officer. Among them are *Dennistoun v. Draper*, 5 Blatchf. 336, 7 Fed. Cas. 488, No. 3,804; *Wood v. Matthews*, 2 Blatchf. 370, 30 Fed. Cas. 465, No. 17,955. See also *Fisk v. Union Pacific R. R.*, 6 Blatchf. 362, 9 Fed. Cas. No. 4,827.

The policy of the courts has been to give a liberal construction to Judicial Code §33 as amended. Thus in *Maryland v. Soper*, 270 U. S. 9, Judicial Code §33 was held applicable to prohibition agents and their chauffeurs, engaged in a quest for an illicit still; in *Colorado v. Symes*, 286 U. S. 510, 517, also holding a prohibition agent within the protection of the section, this court said "Such measures are to be liberally construed to give full effect to the purposes for which they were enacted"; in *United States v. Lee*, 106 U. S. 196, an action of ejectment, where some of the defendants apparently were tax commissioners who bought the land in for the United States, this court said "No case can arise in a state court, where the interest, the property, the right or the authority of the federal government may come in question, which can not be removed into a court of the United States under existing laws";

and in *Tennessee v. Davis*, 100 U. S. 257, in a criminal case in which it was argued by the state that the removal statute only applied to prosecutions in state courts for offenses under the laws of the United States, this court said that the section authorized "the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer"; and in *Davis v. South Carolina*, 107 U. S. 597, also a criminal case, where it was argued that the section applied only to an officer appointed or acting by authority of a revenue law of the United States, or persons acting under or by authority of such officer, and, therefore, United States marshals or their deputies or assistants, even when they were engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States, were not entitled to its protection, this court rejected the argument and held the removal by the marshal of the criminal case from the state to the federal court was authorized, and the statute shielded all who lawfully assisted him in the performance of his official duty.

The Circuit Court of Appeals is somewhat critical of Congress if the statute is to be given the interpretation claimed for it by us. It is said that Judicial Code §33 has no relation generally to removability (R. 27), though by its plain terms that is the only thing with which it is concerned. True, it provides for removal under a different form of procedure, and under different circumstances, from the general removal statute,

as laid down in Judicial Code §28, but it is nonetheless a removal statute. The court seems to think to give it the interpretation contended for by us would in some manner reflect upon Congress; that to so construe it would make an "unsuspected breach in the removal laws by hiding that breach away in a secret place" (R. 28). And the court says it seems "bizarre and fanciful to say that by an amendment of three lines tucked away in a section of the Code related entirely to the removal of suits and transactions against revenue officers, etc., a section having no relation whatever to receivers, nor even generally to removals, it was intended to make a secret breach in the removal laws" (R. 27).

We are quite unable to get this point of view. Minds may differ as to whether Judicial Code §28 or §33 is the more appropriate place for an amendment like this, both sections dealing with removal of causes, but surely neither is a "secret place," and amending either creates "no unsuspected breach" in the removal laws. "This thing was not done in a corner," but after committee hearings and report, and under the white light of full publicity, open debate, and received executive approval.

To our way of thinking, amending §33 was the right way to go about it, for Congress intended to enlarge the class of officers there enumerated to whom the right of removal would be allowed.

POINT IV.

The doctrine of implied repeals is not involved in this case.

The respondent argued in the District Court that to give effect to §33 of the Judicial Code as amended in 1916 under the facts shown here, must result in a repeal by implication of §3 of the Act of March 3, 1887, corrected by the Act of August 13, 1888, now embodied in §66 of the Judicial Code, 28 U. S. C. §125.

The Acts of 1887 and 1888 allow suits against a receiver of property appointed by a Court of the United States, in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court in which such receiver was appointed, but make the suit subject to the general equity jurisdiction of the court of primary receivership.

The argument of implied repeal was not persuasive with the District Court. The District Judge thought that the Acts of 1887-1888 and the Act of 1916 amending Judicial Code §33 could be harmonized, and the rights granted under both preserved, and pointed out that when removal is allowed it has to be in the approximate neighborhood of the plaintiff, which would not have been true except for the Act of 1887-1888, as prior to that time the suit would have been brought in the court of primary jurisdiction wherein the receiver was appointed; and also the right of a jury trial is preserved. The court said, "If it were intended that

the Act of 1916 should not have effect upon the removability of causes, authorized by the Acts of 1887-1888, Congress would inevitably have used some exception rather than use in substance the same language dealing with the same subject-matter. This view is strengthened because there is still left as the effect of the Acts of 1887-1888 the rights above stated" (R. 15).

The same argument was advanced by respondent in the Circuit Court of Appeals, but went unnoticed in the opinion.

The argument was repeated somewhat more faintly on page 11 of respondent's brief in opposition to the granting of a writ of certiorari in this case.

The whole argument is based upon the theory that the language of Mr. Chief Justice Fuller in *Gableman v. P[illegible]ia R. R. Co.*, (1900) 179 U. S. 335, 338, interpreting §3 of the Acts of 1887-1888, wherein he said that the object of those Acts would be open to be defeated if the receiver could remove the case at his volition, is the equivalent of an express legislative prohibition of removal in the Act of Congress itself. This we challenge.

It will be borne in mind that the *Gableman* case was decided before the Act of August 23, 1916, amending Judicial Code §33, was enacted, and, therefore, could not have dealt with the effect of that Act upon the Acts of 1887-1888.

The principal purpose of enacting the "consent" statute in 1887 and 1888 was to permit filing of suits in either state or federal courts against federal receivers "without the previous leave of the court in which such receiver or manager was appointed" 23 R. C. L. p. 127. It may be also, as suggested in the *Gableman* case, that one of the purposes, in addition to the paramount purpose stated, was to allow the litigation to proceed in the approximate neighborhood of the plaintiff. Another purpose may have been in proper cases to allow a trial by jury. All of these purposes are now preserved under the Act of August 23, 1916.

Mr. Chief Justice Fuller in the *Gableman* case clearly recognized that the primary purpose of the earlier Acts was to abrogate the rule theretofore existing that a federal receiver could not be sued without leave of the court appointing him. As the law then stood, he thought that purpose would be defeated if a receiver could remove the case at his volition. As the law then stood, possibly so—though even in that respect he differed with such eminent judges as Judge Taft and Judge Lurton. *Board of Commissioners v. Peirce*, 90 Fed. 764 (1); *Central Trust Co. v. East Tennessee V. & G. Ry. Co.*, 59 Fed. 523 (3), 528. See also *Tompkins v. MacLeod, et al.*, 96 Fed. 927. But when Congress by the amendment of August 23, 1916 of §33 of the Judicial Code so provided in cases where the receiver was sued on account of any act done under the color of his office or in the performance of his duties as an officer of a federal court, the old rule was modified and the right of removal was created.

We have no quarrel with the principal of law heretofore relied upon by respondent, viz., that repeals by implication are not favored; that if effect can reasonably be given to both statutes, the presumption is the earlier one was intended to be unaffected; and that a special and particular statute affording a remedy for particular and specific cases, comprehensive in its nature as to the subject-matter, is not usually repealed by a general law unless the repeal be express or the implication to that end be irresistible. These principles have been declared over and over again by this court and quite recently in *United States v. Burroughs*, 53 S. Ct. 574, 577, 77 L. Ed. 685 (April 10, 1933).

Our reply is that these principles of law have no application in the case at bar. As we have attempted to point out, both statutes as written may and should be enforced. The field to be occupied by each is not the same. The Act of August 23, 1916 (Judicial Code §33, 28 U. S. C. §76) can and should be given effect in this case and will not result in a repeal by implication of the earlier Acts of 1887 and 1888, as now embodied in Judicial Code §66, 28 U. S. C., §125.

Our next point of difference with respondent's argument is that we do not concede the Act of 1887 as amended in 1888 was a special and particular Act, affording a remedy for particular and specific cases, and comprehensively covering the subject-matter, and that the Act of August 23, 1916 was general in its nature. Neither Act seems more particular or special

or comprehensive than the other. It may be, both are particular and special. It is probably more accurate to say that both Acts are general in their nature, having limited application. The same subject-matter is dealt with in part in both Acts, though the words used are slightly different. By the earlier Act, a receiver may be sued without consent of the court "in respect of any act or transaction of his in carrying on the business connected with such property"; and under the Act of 1916 the suit may be removed by the receiver "for or on account of any act done under color of his office or in the performance of his duties as such officer." If Congress had intended that the Act of 1916 should not have the effect of permitting actions against federal equity receivers to be removed where they were sued for official conduct clearly covered by the language used, certainly some exception expressly so indicating would have been contained in the Act rather than to use substantially the same language dealing with the same subject-matter in both Acts. We do not agree, therefore, that this is a case of a general act repealing an earlier special and particular statute and that to sustain removal in this case necessarily must result in repeal by implication of the earlier act.

And the Circuit Court of Appeals has not held in the case at bar that all suits for damages against receivers are not removable. They say only some of them are not. If we adopt the view of respondent, no suit against a federal receiver—whether binding him personally or only the estate he administers—could be removed under Judicial Code §33.

The suggestion was also made in the lower courts that a receiver of a railroad can not operate it negligently "under color of his office," and that a negligent act is one that is unauthorized and is not an act done "in the performance of his duty as such officer." A similar argument was made in this court and was not convincing in *Cleveland, Etc. Co. v. McClung*, 119 U. S. 454, in the case of a removal of a suit against a Collector of Customs who, it was claimed, acted illegally and beyond his authority under the revenue laws of the United States. The discussion by Mr. Chief Justice Waite, on pp. 460-461, is particularly pertinent. See also discussion by Circuit Judge Sanborn, in *Newell v. Byram*, 26 Fed. (2d) on page 201.

V.

Conclusion

To exclude from the operation of Judicial Code §33, as amended, suits against receivers for damages where the receivership estate is sought to be bound, it seems to us would be not to interpret but to amend the Act of August 23, 1916. It was the Congress of the United States that fixed the conditions and the terms of the removability of the action. By express language, simple and clear, the Act applies to "*any* civil suit" commenced "in *any* court of a state" against "*any* officer of the courts of the United States" and for "*any* act done under color of his office," and it may be removed "at *any* time before the trial or final hearing."

To classify and distinguish between different kinds of suits brought against receivers, admittedly officers of the court, though all are for damages because of acts done under color of their offices or in the performance of their duties as such officers, it seems to us obviously defeats the intent of Congress.

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed, and the judgment of the District Court upheld.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 663

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY, PETITIONER,

vs.

MAJOR RUFF, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

Jurisdiction of This Court.

1. The objection to the jurisdiction of this Court is based upon that part of Judicial Code, Section 28, introduced by the Act of March 3, 1887 (24 Stat. 553), reading as follows:

> "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, *and the circuit court shall decide* that the cause was improperly removed, and order it to be remanded to the State Court from whence it came, such remand

> shall be immediately carried into execution, and *no appeal or writ of error* from the decision of the Circuit Court so remanding such cause shall be allowed." (Italics always ours.)

By the same Act of March 3, 1887, however, it was expressly provided in Section 5 (24 Stat. 555):

> "Nothing in this Act shall be held, deemed, or construed, to repeal or affect any *jurisdiction or right* mentioned * * * in Section six hundred and forty-three of the Revised Statutes."

Section 643 of the Revised Statutes is now Judicial Code, Section 33, and is the statute under which the case at bar was removed from the State Court to the District Court of the United States.

It therefore appears that the very Act of Congress, which not only expressly repealed that portion of the Act of March 3, 1875, which granted review of orders of remand by appeal or writs of error, but which went further and provided for such orders of remand to be immediately carried into execution, carefully preserved the rights of that class of officers mentioned in Revised Statutes, Section 643, Judicial Code, Section 33, and exempted them from all provisions in the Act of 1887, including the one just mentioned, which otherwise might have been held to affect or repeal the "jurisdiction" granted or "rights" acquired by the parties under that section. The part of the section invoked, therefore, does not apply to this case.

It seems to us to be no answer to say that the only persons exempted, and the only rights unaffected, were those mentioned in Revised Statutes, Section 643, as it then stood; and that because "officers of the courts of the United States" had not been granted the right of removal at that time, they cannot now claim the exemption provided by

section 5 of the Act of 1887. On the contrary, when the Congress deliberately and purposely chose Revised Statutes Section 643, Judicial Code, Section 33, as the section to be amended in 1916, when the right of removal was to be conferred upon "any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," it may be assumed that the intent of Congress was to put such officers under the statute so amended, with all the exemptions and privileges theretofore granted to revenue officers and others. We know of no rule of construction that would deny to those coming under the statute by later amendment the rights, privileges and exemptions enjoyed by those officers whose class they thus join.

2. This case is not within the letter of the statute which forbids an appeal or writ of error from an order of remand entered by a District Court and provides that the order shall be carried into immediate execution. No order of remand has yet been entered in the case at bar. All that has been done is that the Circuit Court of Appeals has reversed the District Court "with directions to set aside the dismissal and remand the case to the State court" (R. 31).

It is said in the Brief of Respondent that the case "occupies the same status as if the order to remand had been granted in the District Court (Brief for Respondent, p. 9). *German National Bank* v. *Speckert*, 181 U. S. 405, 409, is relied upon by respondent to support the statement. We submit it does not support it. In the *Speckert* case, this Court merely dismissed the appeal obtained under similar circumstances to those prevailing here, and the Court did that upon the sole ground that only "final judgments" could be reviewed under the law as it then stood

and an order of remand was not such a "final" judgment. A careful analysis of the opinion of the Court, appearing on page 409 of the decision, shows that this Court was speaking of an order of remand entered by the Circuit (now District) Court and not of a decision of the Circuit Court of Appeals directing such order to be made. Mr. Justice Gray, speaking for this Court said:

> "It would be an extraordinary result if, while an order of remand by the Circuit Court, of its own motion, is not subject to review in any form, *an order of remand by that court, by direction of the Circuit Court of Appeals*, were subject to a further appeal to this court."

What Mr. Justice Gray probably had in mind was that after the appeal in the *Speckert* case had been dismissed and the order of remand had been entered in the Circuit Court, a further effort to review by direct writ of error might be made under the Act of February 25, 1889, c. 236, (25 Stat. 693) which then provided for a direct review of the decisions of the Circuit Court "in which there shall have been a question involving the jurisdiction of the court," limiting the review, however, where less than $5,000 was involved, to the jurisdictional question only. The court may have wanted to forestall such an effort.

That this court considered a decision of the nature involved in the case at bar reviewable on certiorari is illustrated by the action of the court in *Chicago, Burlington and Quincy Railway Co. v. Willard*, 220 U. S. 413, in which he opinion of the Court was written by Mr. Justice Harlan. In that case there was a motion to remand which was withdrawn in the District Court, but the Circuit Court of Appeals nevertheless inquiring into the jurisdiction of the lower court, on its own motion, reversed the District Court with directions to remand the case to the State Court. One of the defendant railways sued out a writ of certiorari.

This Court entertained it, heard the case, and affirmed the Circuit Court of Appeals. Some suggestion has been made that perhaps the plaintiff prevailed in the *Willard* case, and the case was distinguishable from the instant case on that ground. The fact is the defendant Railways prevailed in the District Court, the jury, by direction of the court, having returned a verdict for them. Of course the plaintiff was benefited by the remand finally ordered, for he got a new trial, but that fact seems quite beside the point on the question of jurisdiction.

3. The Act of February 13, 1925, c. 229 (43 Stat. 938), was intended to and does in terms provide for all decisions of the Circuit Courts of Appeals to be reviewed in this Court either by certiorari, on certified questions, or by writ of error or appeal. Section 239 of the Act provides for certified questions "in any case, civil or criminal, in the Circuit Court of Appeals." Section 240(a) provides for review by certiorari "in any case, civil or criminal, in the Circuit Court of Appeals."

One cannot read the statements of the three Associate Justices of this Court, given before the Senate Judiciary Committee in 1924, or the analysis by this Court of the Bill which later became the Act of 1925 (Report Judiciary Committee, Senate Hearings, Vol. 215), or the subsequent article by Mr. Chief Justice Taft, appearing in 35 Yale Law Journal pages 1 to 12, without reaching the conclusion that a review in this Court was intended to be allowed, under the discretionary jurisdiction of the Court, in every case where the right of appeal or writ of error was not expressly granted.

Judge Taft pointed out in his article that the Act of 1891 creating the Circuit Courts of Appeals was passed in the closing hours of the 50th Congress, and had to be enacted

as reported by the Committee without change, or it would have failed of passage; that the Act was not fully debated before passage; and that there were certain "gaps" respecting the right of review from the decisions of those courts that experience subsequently showed should have been filled.

One of those gaps, we submit, is illustrated by the *Speckert* case under its peculiar facts. By the Act of 1891 appeal or writ of error was allowed only in cases where the decision of the Circuit Court of Appeals was not by the Act made final; and a writ of certiorari could issue only in cases where, by the Act creating the court, its decisions were made final. The judgments of the Circuit Courts of Appeals were made final by the Act of 1891, in cases where jurisdiction was obtained because of the diversity of citizenship of the parties; but if the jurisdiction were obtained because the suit was one arising under the Constitution, laws or treaties of the United States, the decisions were not made final.

An appeal or writ of error could be sued out only to a "final judgment," one that ended the case. Thus it was, some cases removed from state Courts, when passed on by the Circuit Courts of Appeals, were reviewable on certiorari, and others were not. The Act of 1925 reconciled these and other inconsistencies.

As stated by respondent's counsel on the oral argument, the Act of February 13, 1925, Sec. 13, does contain a repealing clause in these words:

> "The following statutes and parts of statutes be, and they are, repealed: All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith."

So, in conclusion on the question of jurisdiction, we submit there are three reasons why the writ of certiorari

should be entertained and the removability of the case decided. For all three of these reasons that part of Judicial Code, Section 28, invoked to defeat the jurisdiction of this Court should be held inapplicable.

The Barnette Case.

It has been suggested that the Barnette case can be distinguished from the instant case because there an effort was made to cancel a deed conveying specific property (real estate) to the receiver, and therefore as a result of the judgment, if the plaintiff prevailed, the *res* would be withdrawn from his custody. We submit the case is not distinguishable on that ground.

In the first place, a suit in tort against a receiver to recover a money judgment, if successful, eventually disturbs his possession of the *res*. In railroad receiverships, the money in the hands of a receiver is generally derived either from revenues or from borrowings. It is property. It is property lawfully in his custody. If a money judgment is recovered, and the court directs it to be paid, a certain part of the *res* is obliged to be withdrawn from his custody, and from the ultimate possession of those who, otherwise, would take it at the close of the receivership.

This very question was considered by this Court in *Barton v. Barbour*, 104 U. S. 126, 129, in which the opinion of this Court was written by Mr. Justice Woods. This case arose before the Act of 1887 in which we find the "consent" statute. The plaintiff in the court below argued that the right to sue in a court of law for a money judgment, without leave of a court appointing a receiver, would not interfere with the court's administration of the property taken into the possesion of its officer, and that such a suit was distinguishable from an action brought to recover specific property in the possession of the court. This court's reply to that argument was:

> "A suit therefore brought without leave, to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the Court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand."

It is true that in the *Barnette* case cancellation of a deed was part of the relief sought to be obtained. The land, however, was conveyed to the receiver, not to the bank before its affairs were placed in the hands of a receiver, and the purpose of so conveying it was to satisfy a demand which the receiver might have asserted against a former officer of the bank. There was also a prayer to recover certain moneys, arising in part from the sale of some of the land and in part from rent derived from it. If the basis of the decision in the *Barnette* case had been that the action in the state court interfered with the custody of specific property by the court's officer, removal would have been given scant consideration, if seems to us, and there would have been no need for this court to refer in the opinion to Judicial Code, Section 28, or to Section 33, or to *Malorazzo* v. *Hostis*, 256 Fed. 882, 887-889. The court's custody of property, or property in the custody of its officers, may always be protected from interference by any other court or officer through more summary process, *i. e.*, through injunction in aid of jurisdiction, or by restraining a party from attempted interference through suit in any other court. The court has this right to protect property being lawfully administered by it, and in *custodia legis*, quite apart from any removal statute, or indeed from any

statute at all. Courts could not function without the power, in aid of jurisdiction, to prevent interference with property in possession of its officers and being administered for the benefit of the parties at interest.

In *Matorazzo* v. *Hustis, supra*, apparently cited by this Court in the *Barnette* case in support of the statement that the case was removable under Section 28 of the Judicial Code, as supplemented by the amendment of Section 33 by the Act of August 23, 1916, the suit was a simple action in tort to recover a money judgment for the homicide of a stranger killed by a railway train. *Texas and Pacific Company* v. *Cox*, 145 U. S. 593, also cited in support of removal in the *Barnette* case, was a similar tort action.

In the *Barnette* case all of the acts and transactions complained of were done either by the receiver actually sued or by his predecessor. The suit could have been brought without leave of the court of the primary receivership because it related to acts and transactions of the receiver, and was covered by the very words of Judicial Code, Section 66. If in the state court proceedings an effort had been made to employ some extraordinary remedy, that would have resulted in the seizure of the *res*, the District Court of the United States, having primary jurisdiction in the receivership case, could have enjoined the prosecution of the proceedings. But that was not what was done. The removal was applied for and obtained, and this Court held that the suit was removable.

In the *Barnette* case there was a charge of fraud and duress practiced by the receiver upon the complaining party. If instead of suing for cancellation of the deed, an action for damages had been brought in which only a money judgment would have been obtainable (as might have been done), could it have been doubted under the decisions of this court the case would still have been removable?

Under the removal statute, Judicial Code, Section 33, the jurisdiction of the United States District Court is not made to depend upon the nature of the relief sought, whether that relief be damages, injunction or cancellation, or for the possession of, or title to, specific property. The statute makes the right to remove dependent upon the nature (official or otherwise) of the acts alleged, on the part of the defendant, which are set up as *facts*, on the basis of which it is claimed that relief should be granted.

On page 17 of the brief of the respondent, it is stated that the *Baruette* case was probably removed to the Federal court under Section 28 of the Judicial Code, because it was brought against a receiver of a corporation chartered by Congress. An examination of the record in the case, as well as the court's opinion, shows, however, that the bank of which Noyes, one of the defendants, was receiver was a Nevada corporation.

Implied Repeals.

Respondent's theory of implied repeal assumes that there is a conflict between that part of the Act of March 3, 1887, now Judicial Code, Section 66, and the amendment of 1916 of Judicial Code, Section 33. We do not concede there is such a conflict.

To begin with, Section 5 of the Act of 1887 here again, just as in the circumstances discussed on pages 1 and 2 hereof, prevents the two statutes from colliding with each other, if the interpretation given to Judicial Code, Section 66, by respondent is accepted. However, we do not accept it.

Respondent would read into Judicial Code, Section 66, usually referred to as the "Consent Statute", a provision against removal of suits brought pursuant to it. He would have this Court interpret Judicial Code, Section 66, in the

same way as the Employers' Liability Act, or the Safety Appliance Act, or Acts relating to National Banks, etc., and he would have this only because in the *Gabelman* case Mr. Chief Justice Fuller, speaking for this Court, incidentally said that he thought the intent of Congress would be defeated if the removal of suits filed in state courts were allowed where they had been brought pursuant to Judicial Code, Section 66.

It will be borne in mind the *Gabelman* case was decided in 1900; officers of the courts of the United States were given the right of removal sixteen years later. Mr. Chief Justice Fuller gave his views in 1900 of *the intent of Congress.* The intent of Congress is made more clearly and conclusively to appear by its own subsequent legislation.

The only question with which the Court was concerned in the Gabelman case, on certified questions, was whether or not *every suit* brought *against an equity receiver appointed by a court of the United States necessarily*, by virtue of his appointment alone, *arose under the Constitution and laws of the United States.* The second question certified was only a corollary of the first. This Court thought not. But the petitioner here has not removed this case because he claims it is a suit arising under the Constitution and laws of the United States. He removed it only because of the amendment of 1916 of the Judicial Code, Section 33, and because he is admittedly an officer of a court of the United States and has been sued on account of an act done under color of his office or in the performance of his duties as such officer.

But even as to the question of whether such a suit as this, against a federal equity receiver, is a suit arising under the Constitution and laws of the United States, we find it hard to reconcile the *Gabelman* case with earlier decisions of this Court, in some of which the opinions were written by Mr. Chief Justice Fuller himself.

In *Rouse* v. *Hornsby*, 161 U. S. 588, 591, Mr. Chief Justice Fuller, speaking for this Court said:

> "The jurisdiction of the Circuit Court over the petition was clearly referable to its jurisdiction of the equity suit, which depended wholly upon diverse citizenship."

In the *Hornsby* case there was an intervention, seeking damages for injuries inflicted through the negligence of the receiver in the operation of the railroad, not chartered by an Act of Congress.

In *Texas and Pacific Railway Co.* v. *Cox*, 145 U. S. 593, 603, which was a suit in tort against the receivers of a railway holding a federal charter, this court, again speaking through Mr. Chief Justice Fuller, said:

> "'As jurisdiction without leave is maintainable through the act of Congress, and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the Circuit Court in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the Constitution and laws of the United States; and this is in harmony with previous decisions. *Buck* v. *Colbath*, 3 Wall. 334; *Feibelman* v. *Packard*, 109 U. S. 421; *Bock* v. *Perkins*, 139 U. S. 628."

Again, in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 463, this Court, speaking through Mr. Justice Gray, interpreted the decision of *Texas and Pacific Railway Co.* v. *Cox*, *supra*, and pointed out that since the right to sue, without the leave of the court which appointed the receiver, was dependent upon the Act of March 3, 1887 (Judicial Code, Section 66), necessarily any suit brought pursuant to that statute was one arising under the Constitution and laws of the United States.

In the *Gabelman* case, the earlier cases cited herein were not reconsidered and overruled. Indeed *Rouse* v. *Hornsby* was cited and was stated to be not inconsistent with what was then held, though, as we have stated, we find ourselves quite unable to reconcile the two decisions.

We might add that the dictum of Mr. Chief Justice Fuller is not only inconsistent with the earlier decisions mentioned above, but also conflicts with the views of Judge Taft while on the Circuit Court of Appeals in *Road Commissioners* v. *Peirce*, 90 Fed. 764, and with what Judge Lurton had to say while a Judge of the Circuit Court of Appeals in *Central Trust Co.* v. *East Tennessee & V. G. R. R.*, 59 Fed. 523 (3), 528.

We repeat we do not find any conflict between that part of the Act of 1887, now embodied in Judicial Code, Section 66, and the Act of 1916 amending Judicial Code, Section 33. We think the history of that part of the Act of 1887, now known as the "Consent Statute", clearly shows that it can be reconciled with the Act of 1916, and yet be given full effect.

In 1881, this court decided *Barton* v. *Barbour*, 104 U. S. 126. In that case Barton sued Barbour in the Supreme Court of the District of Columbia as receiver of a railroad company under appointment of the Circuit Court for the City of Alexandria. The action was for damages suffered by Barton as the result of a personal injury sustained in the derailment of a passenger train operated by the receiver. Barbour filed a plea to the jurisdiction of the court, to which plaintiff demurred; the demurrer was overruled and the plaintiff prosecuted a writ of error to review the judgment. This court held that the receiver could not be sued in *any court*, state or federal, without the previous leave of the court which appointed him. The result of this holding is succinctly stated in the dissenting opinion of

Mr. Justice Miller in the same case, who, inquiring why the suit could not be prosecuted, said:

> "The reply is, because he is a receiver of the road on which the plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts having cognizance of such matters, and all the disputes arising out of these vast transactions *must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the constitutions of the several States and of the United States, is denied to the person injured and even though his case has no element of equitable jurisdiction he is compelled to submit it to a court of chancery or one of the masters of such a court.*"

This decision was handed down less than six years prior to the date of the enactment of the "consent" statute, Judicial Code, Section 66, and was followed and applied generally until the passage of that Act. The evils to be corrected were:

(1) A man was often required to go far away from home to litigate his differences with the receiver in the appointing court.

(2) He was deprived of a right to a jury trial in what would otherwise have been a simple action at law.

(3) He could sue in other courts only with the permission of the court appointing the receiver, which was purely a matter of discretion.

These were the evils, and the Act of 1887 cured them all. It gave a right to sue the receiver for "any act or transaction of his in carrying on the business connected

with such property, *without the previous leave of the court* in which such receiver or manager was appointed."

It did not specify the courts in which such suits might be brought. This was unnecessary for the general jurisdictional statutes covered that subject. The statute shows on its face that the legislature was dealing solely with the established judicial rule requiring consent of the appointing court before suit might be filed. The Act gave the following rights:

1. A party could thereafter secure a trial in his own immediate locality (the ordinary venue and jurisdictional requirements being satisfied), because on removal the case goes to the district and division wherein the proceedings are pending.

2. He could have a trial by jury in law actions.

3. His right to sue was absolute and no longer dependent upon the discretion of any court.

If these paramount and primary mischiefs and remedies are kept in mind, and we are not diverted by thoughts of removal to which the Act of 1887, so far as the "consent" section is concerned, did not relate, it will be readily seen that both Judicial Code, Section 66, and Judicial Code, Section 33, as amended in 1916, may be given full effect without the one impinging on the other.

It has been argued that the right to sue, as used in Judicial Code, Section 66, means the right to sue to final judgment. Attention is again called to the fact that Judicial Code, Section 66, does not mention the courts in which such suits without leave of the court may be filed. Plaintiff may elect, and sue either in the State or the United States Court, as venue and his preference may determine. We are aware of no decisions which hold that legislative permission to sue generally, as distinguished

from judicial permission specially granted, means the right to sue in the forum the plaintiff chooses and to secure final judgment there if by statute removal has been authorized. The right to sue does mean the right to a final adjudication. Otherwise the right would be illusory and would be no right at all. But it does not mean the right to final judgment in any given court when rights of removal intervene. If we follow this argument, advanced on behalf of respondent, to its logical conclusion, Judicial Code, Section 66, must be held in cases where federal equity receivers are sued to have repealed those provisions of Judicial Code, Section 28, which provide for removal in cases of diversity of citizenship, or of suits arising under the Constitution, laws and treaties of the United States, etc.

Reference also has been made in the oral argument to the fact that Judicial Code, Section 33, before 1916 protected the *res*, while the Act of 1916 does not purport so to do. It is true that before 1916, certain specific property, where title was derived under a revenue law, was protected in suits against persons so acquiring it, but revenue and other officers sued, whether specific property was involved in the action or not, were likewise protected. The test of protection before 1916 was not dependent upon any *res*. We have cited in our original brief, pages 20-23, many cases where the officer was sued, and there was no need to protect any specific property, and where removal was upheld. Moreover, while there might have been some reason in the early statutes to expressly protect the *res* in the statute itself, there was no need for such provision in the Amendment of 1916. And that is so because of the familiar principle, resting upon comity of courts, that the court first taking possession of the *res* is entitled thereafter to administer it without interference from any other court. Federal equity receivers are only

appointed where there is a *res* to administer. It is idle to have a receiver unless there is something to be received. Upon appointment, and taking the *res* into possession, it is in *custodia legis*, and the jurisdiction of the court so controlling it is paramount and exclusive. This right of exclusive control by the court rests not upon statute, and is in no sense related to removal. It is expressly recognized, however, in the last clause of Judicial Code, Section 66.

The Suggestion That Judicial Code, Section 33, Relates Only to Statutory Officers of the Court Is Untenable.

1. No such limitation appears in the statute itself.

2. For many years prior to the Act of August 23, 1916, the courts had held that receivers were officers of the courts appointing them, the decisions going as far back as *Railroad Company* v. *Souther*, 2 Wall. 510, 519. See collection of authorities in *Matarazzo* v. *Hustis*, 256 Fed. 888-891. See also Clark on Receivers, Sec. 34, and cases cited. "The legislature must be presumed to use words in their known and ordinary signification." *Levy's Lessee* v. *McCartee*, 6 Pet. 102.

3. The Bankruptcy Act (11 U. S. C., Sec. 1) provides that: "'Officer' shall include clerk, marshal, receiver, referee and trustee . . . ." and a receiver in bankruptcy is thus a statutory officer of the court. Can it be that Section 33 of the Judicial Code includes *receivers in bankruptcy* and yet does not include *receivers in equity cases*, who perform the same general duties?"

4. That receivers are officers of the court, within the meaning of the statute, was conceded by the Circuit Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 663.

EDWARD GAY, JR., Receiver of the SAVANNAH AND ATLANTA RAILWAY, *Petitioner*,

vs.

MAJOR RUFF, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, IN OPPOSITION.

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For Respondent.

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Opinions of the Court below.

The opinion of the District Court will be found on pages 11 to 16 of the Record and is reported in 3 Fed. Supplement 264.

The opinion of the Circuit Court of Appeals is fully set out in pages 25-30 of the Record, but has not yet been reported.

Jurisdiction.

The jurisdiction of this Court to review the ruling of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A. Sec. 347(a).)

The jurisdiction of this Court to review the judgment complained of is, however, challenged by respondent.

The judgment which is sought to be reviewed by the writ of Certiorari is a judgment of the Circuit Court of Appeals of the Fifth Circuit, reversing the United States District Court of the Southern District of Georgia for denying a motion to remand to the State Court, a certain cause pending in the District Court in which respondent was plaintiff and petitioner was defendant.

In the District Court the Motion of respondent to remand the case to the Court was state denied, but upon appeal to the Circuit Court of Appeals the judgment of the District Court was reversed with direction to set aside the order of dismissal in the District Court, and to remand the case to the State Court.

This petition for certiorari seeks to review that ruling in this Court, and we respectfully insist that such a review is forbidden by statute.

"The Statute provides, 'whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order it to be remanded to the State Court from whence it came, such remand shall be immediately carried into effect and there shall be no appeal or writ of error from the decision of the District Court, 28 U. S. C. A. Section 71.

This statute, in terms, applies to all cases removed from the state courts.

Argument on the jurisdiction.

Under the plain terms of the Statute, and under repeated rulings of this Court an order remanding a case to the State Court is not subject to review, directly or indirectly, but is final and conclusive.

28 U. S. C. A. Section 71.
Missouri Pacific R. R. Co. v. Fitzgerald, 160 U. S. 556, 580, 583.
McLaughlin Bros. v. Hollowell, 228 U. S. 278, 286.
Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 447.
Yankaus v. Feltenstein, 244 U. S. 127.
Powers v. Chesapeake & Ohio Rlwy. Co., 169 U. S. 92.
In re Matthew Addy Steamship & Commerce Corporation, 256 U. S. 417.

It being conceded that no appeal could have been taken, by any method, from the granting of a motion to remand by the District Court, petitioner in this case is driven to the position that an appeal is possible when the order of remand is granted by the Circuit Court of Appeals, on appeal from its refusal in the District Court. (Brief for Petitioner, pp. 12, 13.) That precise contention has however been expressly denied by this Court.

German National Bank v. Speckert, et al., 181 U. S. 926.

To quote from the language of Mr. Justice Gray in the case cited *supra*:

"In the present case the remand to the State Court was denied by the Circuit" (now District) "Court of the United States but, on appeal from the decree dismissing its bill, was ordered by the Circuit Court of Appeals."

"If the Circuit" (now District) "Court had ordered the case remanded its order could not, according to the decisions above cited, have reviewed by this Court, *in any manner*, either by appeal from that Court, or by Mandamus to that court, or by writ of Error to the State Court."

"It would be an extraordinary result if while an order to remand by the Circuit" (now District) "Court is not subject to review *in any form*, an order of remand by that Court, by direction of the Circuit Court of Appeals were subject to a further appeal to this Court."

In the German National Bank case, *supra*, the review was sought by an appeal from the judgment of the Circuit Court of Appeals, and, of course, before the mandate of the Circuit Court of Appeals had been sent down to the District Court, or executed therein.

In the German National Bank case, and in the several cases cited therein it seems to us, that the judgment of the Court rested not on one but on two propositions, first, that the order of remand was not a "final judgment," from which an appeal could be taken under the provisions of the Act of March 3, 1891, and, second, that there could be no review of an order remanding a case to the State Court, on account of the statutory provision "such remand shall be immediately carried into execution." The recent certiorari acts do not touch the second proposition.

The Writ of Mandamus lies before "final judgment," and yet this Court has uniformly held that Writ does not lie to require a District Court to retain jurisdiction of a case that it had ordered remanded to the State Court, and that it does not lie because of the statutory provision that "such remand shall be immediately carried into execution."

> Re Pennsylvania Co., 137 U. S. 451.
> In re Matthew Addy & Co., 206 U. S. 417, and authorities cited.

In the case of Pennsylvania Co., *supra*, Mr. Justice Bradley, after quoting the Act of 1887, said:

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal if the writ of man-

> damus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the word 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy, *by whatever process*. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 151, 34 L. ed. 740, 11 Sup. Ct. Rep. 112.

We can only add to this the observation that the argument is equally strong against a review by certiorari.

Petitioner urges that the Act of March 13, 1911, and of February 13, 1925, establishing the present certiorari practice "greatly alters and enlarges this Court's jurisdiction on certiorari."

While in a sense that may be true, in that it authorized this Court to bring up on certiorari all cases embraced in the Acts, "before as well as after a judgment or decree of the lower court," yet the main purpose of those acts was to restrict and narrow the right of appeal by abolishing appeal and writ of error from the lower courts, except in cases where the same was allowed by special statute, and to allow but not require the supreme court to bring up on certiorari such cases and only such cases as had been previously coming up, as a matter of right, either upon appeal or writ of error.

Such was the purpose of the Act of 1925, as was fully set forth by several distinguished members of this Court in the Hearings before the Subcommittee of the Senate Committee on the Judiciary, 68th Congress, First Session, on the bills S. 2061 and S. 2062.

That the purpose or effect of this legislation was to confer jurisdiction upon this Court to review cases in which

the right of review was expressly denied by statute is both unreasonable and unthinkable. Nor did these two acts repeal, by any sort of implication, the provision of the acts of 1887 and 1888 specifically denying review of the action of lower Court in remanding cases to the State Courts.

The rule against repeal by implication is especially applicable where the prior law is a special Act relating to a particular case or class of cases and the subsequent law is general in its terms and application.

> Petri v. Creelman Lumber Co., 199 U. S. 487, 497.
> Rodgers v. U. S., 185 U. S. 83, 87, 88.

The mere fact that one statute is special and the other general creates a presumption that the special is to remain an exception to the general.

> Washington v. Miller, 235 U. S. 422, 428.

The test of what is meant by special and general acts, within the scope of the above rule is not a narrow one and in many instances both acts were general statutes, one with a broader application than the other.

> Rodgers v. U. S., 185 U. S. 83, 88, 89.
> Ex Parte, U. S., 226 U. S. 420, 424.
> U. S. v. Greathouse, 166 U. S. 601.
> U. S. v. Healey, 160 U. S. 136, 146.
> Townsend v. Little, 109 U. S. 504.
> Ex Parte, Crow Dog, 109 U. S. 556, 570.
> Great Northern R. R. Co. v. U. S., 155 Fed. 945, 960, 961.

We therefore submit that the Acts of 1887 and 1888, denying all appeal from the granting of an order to remand were not repealed or in any way modified by the changes in the present certiorari law, and that because of the statutory inhibition against "any prolongation of the controversy" the judgment of the Circuit Court of Appeals ordering a remand to the State Court can not be reviewed in this Court.

STATEMENT OF CASE.

Although confident that our challenge to the jurisdiction of this court, as set out in the preceding paragraph of this brief, is good, we desire to submit a very brief statement of the case itself, and an equally brief argument in support of the decision of the Circuit Court of Appeals and against the granting of the petition for Certiorari in the event this Court shall hold that it has jurisdiction to review, by certiorari, the granting of an order to remand to the State Court.

Ruff, the respondent, brought an action against Gay, Receiver, to recover damages for the wrongful homicide of his minor son. This action was brought in the State Court having jurisdiction. (Rec. p. 1.) Gay was the Receiver of the Savannah and Atlanta Railway, a Georgia corporation (Rec. p. 1) and Gay was appointed Receiver of Railway by the U. S. District Court of the Southern District of Georgia in the exercise of its equity powers. (Rec. p. 1.) This action was "in respect to acts and transactions of the Receiver in carrying on the business connected with the Railway property (Rec. p. 1). It was authorized, without previous leave of the Court appointing the Receiver under the provisions of the Act of March 3, 1887, Section 3 (28 U. S. C. A. Section 125.) Thereupon the Receiver removed the case to the United States District Court in which he had been appointed, said removal being taken under the provisions of Section 33 of the Judicial Code as amended by the Act of August 23, 1916 (28 U. S. C. A. Section 76). Respondent then made a timely motion to remand the case to the State Court (Rec. p. 9), contending that the Act of 1916 had in no way repealed the Act of 1887 and that properly construed the Act of 1916 only authorized removals to the Federal Court where the effort was to subject him individually, in his person or estate, to Civil or Criminal liability in the State Court, and not merely to charge the property of which he was Receiver with liability.

The motion to remand was overruled by the District Court and following the dismissal of his action in that Court respondent took an appeal to the Circuit Court of the United States for the Fifth Circuit. In that Court the appeal of respondent was sustained and the District Court was reversed, the Circuit Court of Appeals directing the District Court to set aside the order dismissing the case and to remand the same to the State Court. (Rec. p. 30.)

That judgment petitioner seeks to review by Writ of Certiorari.

QUESTION PRESENTED.

The question is whether a suit against a Receiver appointed by a Court of the United States, to recover damages from the receivership estate for the negligence and torts of his agents in the operation of the property committed to his charge can be removed to the United States Court appointing such Receiver on the sole ground that the suit is against a Receiver of the Federal Court, and for that reason alone, diversity of citizenship and all other federal questions being absent; in other words whether or not the Act of 1916, amending Section 33 of the Judicial Code, applies only to actions and proceedings brought personally against the receiver and seeking to hold him liable as an individual, or shall be given the broader construction contended for by petitioner, and authorizes the removal of all suits where the sole effort is to hold the property in receivership liable.

ARGUMENT.

The Court of Appeals of the Fifth Circuit held that Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, merely conferred on Receivers, as officers of the Federal Court the power to remove to the Court appointing them all actions and proceedings that sought to charge them with individual liability on account of Acts done in their official capacity, and that properly construed

the Act of August 23, 1916, did not authorize the removal to the federal Courts of Actions and proceedings the object and purpose of which was merely to charge the estate in receivership, or the Corporation, with liability. (Record pp. 25-30.)

The construction given by the court below to Section 33 as amended by the Act of 1916 is the most natural and reasonable construction of the Statute that is possible. If the statute is to be given the construction contended for by petitioner, then it is thrown in irreconcilable conflict with the Act of March 3, 1887, and August 13, 1888 (28 U. S. C. A. Section 125) and must necessarily repeal those statutes by implication.

Those acts authorized suits to be brought against a Receiver appointed by the Courts of the United States without the previous leave of such Courts "in respect of any act or transaction of his in carrying on the business connected with such property."

28 U. S. C. A. Section 125.

After considerable diversity of opinion in the several district and circuit courts of the United States, the Supreme Court of the United States finally held (1900) that a suit brought in a state court under its terms was not removable to the Federal Court either as a suit arising under the Constitution and laws of the United States or because the receiver in such case was one appointed by a court of the United States.

Gableman v. Peoria Ry. Co., 179 U. S. 335 (45 L. Ed. 220).

After stating that the purpose of the statute was to allow a citizen the right to sue in the local (state) courts and not to compel him to litigate "at a distance, or in any other forum," the opinion of Chief Justice Fuller in that case states:

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done, cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act."

In passing the Act of August 23, 1916, amending Section 33 of the Judicial Code, Congress did not intend to affect, in any way the Acts of 1887 and 1888 authorizing certain suits to be brought in the state courts. As pointed out the Circuit Court of Appeals in its opinion (Record, p. 29) the House Report on the bill that subsequently became the Act of August 23, 1916, contained this significant statement: "The statute, with the proposed Amendment, does not extend in any way the jurisdiction or the powers of the Courts of the United States." And yet to give the Act of 1916 the construction contended for by petitioner would greatly extend the powers and jurisdiction of the Courts of the United States by enabling all receivers appointed by those courts to arbitrarily remove from the State Courts the numerous cases embraced with the terms of the Acts of 1887 and 1888, by authorizing the removal of these suits (usually tort actions) to the federal courts for trial, thus reversing a policy that had even then been followed for almost thirty years with respect to these cases.

Besides, to give to the Act of August 23, 1916, the construction contended for by petitioner is to give to Receivers of the Courts of the United States a broader protection than was ever given to the Revenue officers under the original text of Section 33 of the Judicial Code. Those officers were only protected against the effort to hold them *individually liable*, in person or estate, and acts done in the execution of their duty as federal officers or under color of such office.

Maryland v. Soper, 270 U. S. 9.
Stacey v. Chicago Ry. Co., 16 Fed. (2d) 609.

To give the Act of August 23, 1916, the construction placed upon it by the Circuit Court of Appeals of the Fifth Circuit, harmonizes that Act with the Acts of 1887 and 1888. To give it the construction contended for petitioner necessarily effects the repeal by implication of the Acts of 1887 and 1888.

We hold the following propositions as so axiomatic as to require no citation of authority, although abundant citation on each of them could be furnished, both from the opinions and decisions of this Court, as well as from many others:

1. Repeal of Statutes by implication is never favored.

2. Repeal by implication results only where the provisions of the more recent act are in clear and irreconcilable conflict with those of the act so repealed.

3. To effect such a repeal judicial construction is required, and in such cases the attempt is to discover and declare the legislative intent.

4. The two acts between which there is apparent conflict must be so construed as to harmonize with each other, if such be possible.

5. The rule against repealing a statute by implication is especially applicable where the prior law relates to a particular class of cases, and the subsequent law is more general in its terms, although broad enough to cover the prior statutes.

Measured by all of these tests the construction of the Act of August 23, 1916, as repealing the Acts of 1887 and 1888, contended for by petitioner, is untenable; and that set up by the Circuit Court of Appeals of the Fifth Circuit is reasonable and tenable.

The opinion of the Circuit Court of Appeals of the Fifth Circuit (Record pp. 25-30) is before the court and its

strength and clearness have rendered it unnecessary for respondent to go more fully into the merits of these contentions, in this brief.

SUMMARY.

Respondent insists:

1. That this court is without jurisdiction to grant the Writ of Certiorari in this cause, because of the statutory inhibition herein set out.

2. That even if the court shall be of opinion that the writ lies, in this case the decision complained of is so clearly right that there ought to be no further review of the question, and the Writ of Certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 663.

CHARLES E. GAY, JR., Receiver of the Savannah and Atlanta Railway, *Plaintiff in Certiorari*,

v.

MAJOR RUFF, *Defendant in Certiorari*.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN CERTIORARI.

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IN THE

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v.

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Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN CERTIORARI.

Opinions of the Court Below.

The District Court's opinion will be found on pages 11 to 16 of the Record and is reported in 3 Fed. Supplement 264.

The opinion of the Circuit Court of Appeals is found on pages 25 to 30 of the Record, and has not yet been reported.

Jurisdiction.

The jurisdiction of this Court to review the ruling of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (Title 28 U. S. C. Sec. 347(a).)

It is challenged here by defendant in certiorari because of the provisions of the second section of the Judiciary Act of March 3, 1887, now codified in Title 28, U. S. C. Sec. 71.

Statement.

Ruff brought suit in the State Court of Warren County, Georgia, to recover damages from Gay, as receiver of the Savannah and Atlanta Railway, for the negligent homicide of the minor son of Ruff. The tort was inflicted by Gay and his agents while carrying on the business of the railway property of the Savannah and Atlanta Railway, a Georgia corporation which Gay was then operating as receiver, appointed under the general equity powers of the United States District Court for the Southern District of Georgia. (Record pp. 1-3.)

Thereupon and before pleading, Gay removed the cause to the United States Court for the Southern District of Georgia, on the sole ground that he was the receiver and officer of that Court and that the suit in the State Court against him as such receiver was for and on account of acts done by him under color of his office and as such receiver and officer of the Federal Court. (Record pp. 5-7.)

Thereupon Ruff moved to remand said cause to the State Court upon the grounds, briefly stated, that the receiver was not an officer of the Court of the United States within the purview and true intent of the Act of August 23, 1916, amending Section 33 of the Judicial Code, and that the suit was not a civil action brought against the receiver "for and on account of any act done under color of his office or in the performance of his duties as such officer," within the purview of said Act of August 23, 1916, and because the

suit removed was brought against such receiver "in respect to acts and transactions of his in carrying on the business connected with such property," and was therefore properly brought in the State Court within the purview and true intent of Section 71 of Title 28 U. S. C. and is therefore not removable; for all of the above reasons, the Disfrict Court had no power to remove said suit from the State Court and no jurisdiction to hear and determine the same. (Record pp. 5-7.)

This motion was overruled by the District Court (Rec. pp. 11-16) and the cause itself was subsequently dismissed in that Court. (Rec. p. 17.)

Ruff then prosecuted an appeal to review these rulings to the Circuit Court of Appeals of the United States for the Fifth Circuit. (Rec. pp. 17-24.)

Upon appeal the Circuit Court of Appeals reversed the judgment of the District Court and directed that the dismissal be set aside and the cause remanded to the State Court. (R. p. 30.)

Questions Presented.

There are three questions presented by this case:

First, whether the present certiorari law as codified in Title 28 U. S. C. Sec. 347(a), and particularly the Act of February 13, 1925, permits this Court to review by writ of certiorari the decision of a Circuit Court of Appeals of the United States granting the remand of a cause to the State Court from which it has been removed, or whether such review is prohibited by the second section of the Judiciary Act of March 3, 1887, now codified in Title 28 U. S. C. Sec. 71.

Second, whether the petitioner, as receiver of the Federal Court, appointed under its general equity powers, diversity of citizenship and all other federal questions being absent, has the right to remove from a State Court a tort action against him as such receiver, such action growing out of his

operation as such receiver of a railway property; or whether such removal of an ordinary tort action is forbidden by the third section of the Act of March 3, 1887, now codified in Title 28 U. S. C. Sec. 125.

Third, implicit in both of the above propositions is the question whether prior statutes relating to a particular class of cases are repealed, by implication, by subsequent general statutes containing no repealing clauses and making no reference to such prior statutes, but broad enough in terms to cover them; or whether such prior statutes remain in force as exceptions to the later and more general statutes.

Argument.

I.

The jurisdiction of this court to review an order of remand to the state court.

We renew our challenge to the jurisdiction of this Court to review an order of the Circuit Court of Appeals of the United States remanding a cause to the State Court from which it had been removed.

Prior to the Judiciary Act of March 3, 1875, an order of a Circuit (now District) Court of the United States remanding a cause to the State Court from which it had been removed could not be reviewed in this Court on appeal or writ of error because it was not a "final judgment" of the Court below.

Chicago & Alton R. R. Co. v. Wiswall, 23 Wall. 509.

By the Act of March 3, 1875, however, express provision was made for the review by appeal or writ of error of such an order of remand.

18 Stat. 470.

By the Judiciary Act of March 3, 1887, as corrected by the Act of August 13, 1888, it was provided:

> "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States and the Circuit Court shall decide that the cause was improperly removed and order it to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and there shall be no appeal or writ of error from the decision of the Circuit Court."

This Act expressly repeals the Act of March 3, 1875, and with the single change that the word "district" is substituted for by the word "circuit" wherever the same occurs has been reenacted and codified both in the Judicial Code of 1911 and the United States Code of 1926.

> 24 Stat. 552.
> Title 28 U. S. C. Sec. 71.

Since the enactment of this statute, this Court has uniformly and repeatedly held that such an order of remand is final and conclusive and is not subject to review here in any manner, directly or indirectly.

> *Morey v. Lockhart*, 123 U. S. 56.
> *Richmond & Danville R. R. Co. v. Thouron*, 134 U. S. 45.
> *Guernsey v. County of Patrick*, 137 U. S. 601.
> *Ex Parte with Pennsylvania Co.*, 137 U. S. 451.
> *Birdseye v. Schaffer*, 140 U. S. 117.
> *Mo. Pac. Ruy. Co. v. Fitzgerald*, 160 U. S. 556.
> *Powers v. C. & O. R. R. Co.*, 169 U. S. 92.
> *McLaughlin Bros. v. Hallowell*, 228 U. S. 278, 286.
> *Pacific Livestock Co. v. Lewis*, 241 U. S. 440, 447.
> *Yankaus v. Feltenstein*, 244 U. S. 127.
> *In the Matter of Matthew Addy, etc. Corp.*, 256 U. S. 417.

Many of the above cases were confined to holding that the order of remand could not be reviewed here by appeal or

writ of error because it was not a "final judgment" of the Court below from which such an appeal or writ of error might be prosecuted to this Court.

In *Chicago & Alton Railroad Company*, 23 Wall. 507, this Court held that while it had no jurisdiction to review an order of remand by writ of error, because the order of remand was not a "final judgment" of the Court below, the writ of mandamus could be employed to require the Court below to retain jurisdiction of a cause that it ordered remanded to the State Court, where the right of removal was undoubted.

After the passage of the Act of March 3, 1887, containing the provision that such remand shall be immediately carried into execution, this Court gave repeated expression to the opinion that it had no jurisdiction to review, in any way, the granting of a remand to the State Court by any of the lower federal courts.

In the case of *Morey v. Lockhart*, decided less than eight months after the passage of the Act of March 3, 1887, Mr. Chief Justice Waite, speaking for the Court, after quoting the Act, used this expression:

> "It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, *and not the subject of review in this court.*" (Italics mine.)
>
> *Morey v. Lockhart*, 123 U. S. 56, 58.

In the same case and on the same page, Chief Justice Waite effectually disposed of another contention made in behalf of the plaintiff in certiorari in this case, when he said:

> "It is contended, however, that the prohibitions against appeals and writs of error in the Act of 1887 apply only to removals on account of prejudice or local influence, but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local in-

fluence as well as those for other causes, and the prohibition has no words of limitation. It is in effect that no appeal or writ of error shall be allowed from an order to remand in 'any cause' removed 'from any state court into any Circuit Court of the United States.' The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of Congress."

Morey v. Lockhart, 123 U. S. 56, 58.

In *Powers v. Chesapeake & Ohio Railroad Company*, this Court held that an order of remand to the State Court "is not reviewable" by this Court.

Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 98.

In the *McLaughlin* case, it was held that an order of the United States Circuit Court remanding a case to a State Court is not reviewable here, directly or indirectly.

McLaughlin Bros. v. Hallowell, 228 U. S. 278.

Prior to the enactment of the statute of March 3, 1887, containing in its second section the requirement that an order of remand to a State Court "shall be immediately carried into execution," this Court more than once held that the writ of mandamus could be employed to require a Court to retain jurisdiction of a cause removed from the State Court and ordered remanded to that Court, although under the statute neither appeal nor writ of error could be entertained to review such a ruling.

This was decided in *Chicago & Alton Railroad Co. v. Wiswall*, cited *supra*; and in the cases referred to in that case.

Subsequent to the passage of the Act of March 3, 1887, however, it was decided that while that Act abrogated *in terms* only an appeal and writ of error to review orders

of remand to the State Court, yet the language in the statute "such remand shall be immediately carried into execution" operated to prohibit the use of the writ of mandamus to require the lower court to retain jurisdiction of the cause.

In re Pennsylvania Co., 137 U. S. 451.

Later, in the case of *Mo. Pacific R. R. Co. v. Fitzgerald*, this Court, after reviewing the prior cases said:

> "We see no reason for reconsidering these conclusions and it may be regarded as settled that an order of the circuit court remanding a cause cannot be reviewed in this court by any direct proceedings for that purpose."
>
> *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556, 582.

In the *Matthew Addy* case, which was an attempt to employ the writ of mandamus to require the Court below to vacate an order improperly remanding a cause to the State Court, this Court held that the use of the writ of mandamus was not permitted on account of the provision in the Act of March 3, 1887, that "such remand shall be immediately carried into execution" and after citing approvingly all of the cases heretofore referred to in this case, remarked:

> "It is obvious that this statute, and these decisions interpreting it, rule the case at bar, and require that the petition for mandamus be dismissed."
>
> *Matthew Addy Steamship & Commerce Corp.*, 256 U. S. 417, 420.

The contention has been advanced that the second section of the Act of March 3, 1875, in terms relates to orders of the District Court and not judgments of the Circuit Courts of Appeal: that the District Court has not decided that this cause should be remanded and no order of remand has been entered there, the Circuit Court of Appeals having merely directed that such an order be entered. That precise contention has been ruled by this court adversely.

In the case of *German National Bank v. Speckert*, it was held that a decision of the Circuit Court of Appeals reversing a decree of the District Court which denied a motion to remand a case to the State Court and ordering the District Court to remand the case, occupies the same status as if the order to remand had been granted in the District Court.

German National Bank v. Speckert, 181 U. S. 405.

In that case, Mr. Justice Gray quotes approvingly the opinion of Mr. Justice Bradley *In Re Pennsylvania Company, supra*, to the effect that the words in the statute "such remand shall be immediately carried into execution" are strongly indicative of an intent on the part of Congress "to suppress further prolongation of the controversy by whatever process".

Ibid, page 408.

On the precise point as to the applicability of the statute to a decision of the Circuit Court of Appeals reversing the District Court for failure to remand a cause, Mr. Justice Gray said:

> "In the present case the remand to the State Court was denied by the Circuit (now District) Court but, on appeal from its decree dismissing the bill, was ordered by the Circuit Court of Appeals.
>
> "If the Circuit (District) Court had ordered the case to be remanded, its order could not, according to the decisions above cited, have been reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the state court.
>
> "It would be an extraordinary result if, while an order of remand by the circuit court, of its own motion, is not subject to review in any form, an order of remand by that court, by direction of the circuit court of appeals, were subject to a further appeal to this court."

Ibid, page 409.

The Present Certiorari Law.

The power of this court to grant the writ of certiorari is claimed under the Act of February 13, 1925. So far as that statute relates to the grant of the writ of certiorari in cases pending in the Circuit Courts of Appeal, it reads as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."
>
> 43 Stat. 938; Title 28 U. S. C. Sec. 347(a).

Prior to the Act of March 3, 1891, the use of the writ of certiorari by this Court, had been mainly confined to its employment for diminution of the record to bring up proceedings or records from the lower court in order to aid in determining causes pending here. It was not of enough importance to be expressly mentioned in the general Judiciary Act of 1789 but by the Judiciary Act of March 3, 1891 (26 Stat. 828), it was provided that it should be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of a party thereto, the certification to that Court of any cause, civil or criminal, in which the judgment of the Circuit Court of Appeals was "made final" by statute,—that is cases in which the jurisdiction of the federal court was dependent entirely upon diversity of citizenship, and cases arising under the patent, revenue and criminal law, and admiralty cases. (26 Stat. 826.) This provision was reenacted as Section 240 of the Judicial Code of 1911, and by the Act of February 13, 1925, cited *supra*, it was amended to read as it now stands and as it has been quoted *supra*.

One of the primary purposes of the Act of February 13, 1925, was to make the decision of the Circuit Courts of Appeal final generally and in all cases except those in which Congress had expressly provided for appeal to the Supreme Court. Its purpose was to contract and not to expand the jurisdiction of this Court, to relieve it from an ever increasing burden of business and not to aggravate and increase that burden.

> Appellate Jurisdiction of the Supreme Court under the Act of February 13, 1925. (By Chief Justice Taft) 35 Yale Law Journal 1 and 2; Testimony of Mr. Justice Van Devanter and Mr. Justice McReynolds in the hearing before the sub-committee of the Committee on the Judiciary of the United States Senate, February 2, 1924, First Session of the 68th Congress, Senate Document No. 94446, p. 27.

Under the circumstances, the contention that the effect of this Act was to confer jurisdiction upon this Court to review cases in any instance where the right of review was expressly denied by statute is unreasonable.

The Act of February 13, 1925, contains no repealing clause. There is no reference whatever in it to the provisions of the Judiciary Act of March 3, 1887. If it repeals that Act, it must do so by implication.

Repeals by implication are never favored. The rule against such repeal is strong and especially applicable where the prior law is a special act such as one relating to the removal of causes from the State to the Federal Courts and the remand of such causes back to the State Courts, and the subsequent law is general in its terms and operation. The fact that one statute is special and the other general creates a presumption that the special is to remain as an exception to the general and repeal by implication in such a case only results when the implication to that end is irresistible.

This particular phase of the argument will be amplified and supported by authority in the concluding section of this brief.

II.

Removability of the cause.

By the Act of March 3, 1887, Section 3, it is provided:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."
>
> Title 28 U. S. C. A., Section 125.

After considerable diversity of opinion in the several district and circuit courts of the United States, the Supreme Court of the United States finally held (1900) that a suit brought in a state court under its terms was not removable to the Federal Court either as a suit arising under the Constitution and laws of the United States or because the receiver in such case was one appointed by a court of the United States.

> *Gableman v. Peoria Railway Company*, 179 U. S. 335 (45 L. Ed. 220).

It is interesting to note in this connection that in the dissenting opinion of Mr. Justice Brandeis, in *Barnette v. Wells Fargo Nevada National Bank*, Note 7, there is given an interesting account of this diversity of decision in the lower federal courts on this question and of the final solution of these differences that is found in the case of *Gableman v. Peoria Railway Company, supra*. This opinion was rendered on March 15, 1926.

> *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438, 451, Note 7.

It seems to us that the *Gableman* case definitely and finally settled the question of removability of cases brought under the permission contained in the third section of the Act of March 3, 1887. Such was evidently the opinion of Mr. Justice Brandeis *as late as March 15, 1926:*

The *Gableman* case has been cited approvingly in the following cases decided since the passage of the Act of August 23, 1916, amending Section 33 of the Judicial Code:

American Brake Shoe and Foundry Co. v. Railway Company (1920), 263 F. 237-240.
Luhrig Collieries Co. v. International Coal & Dock Co. (1921), 281 F. 271.
Toledo Fence & Post Co. v. Lyons (1923), 290 Fed. 637-643.
Walters v. Payne (1923), 292 F. 124-127.
Field v. Kansas City Refining Co. (1924), 296 F. 800-806.
Ford Motor Co. v. Auto Insurance Co. (1926), 13 F. (2d) 415-417.

It cannot be seriously questioned that under the Act of March 3, 1887, third section, as construed in the *Gableman* case, the case at bar was not removable from the state Court into the Federal District Court since there was no diversity of citizenship or any other ground of federal jurisdiction, and the sole claim for removal was that the defendant was a receiver of a state corporation appointed by the Federal Court in the exercise of its general equity powers. This must be true unless the law as to removal of this character of cases has been changed by the Act of August 23, 1916, amending Section 33 of the Judicial Code.

Section 33 of the Judicial Code as amended by the Act of 1916.

Section 33 of the Judicial Code of the United States, providing for the removal of civil and criminal cases by officers of the Government engaged in the collection of its revenue where such cases relate to acts done by such offi-

cers under the color of their office or in the performance of their duties, was amended in 1916 so as to include "any officer of the Courts of the United States on account of any act done under color of his office or in the performance of his duty as such officer."

39 Stat. 532.
Title 28 U. S. C. A., Section 76.

It is to be observed that the protection afforded to revenue officers under the above section is different from that extended by the Act of 1916 to the "officers" of the Federal Court.

The protection extended to revenue officers and persons acting under their authority was "on account of any act done under color of his office or of any such law, *or on account of any right, title, or authority claimed by such officer or other person under any such law, or if commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law*" (italics mine), whereas the protection extended to officers of the Federal Court is simply against civil or criminal actions "for or on account of any act done under color of his office or in performance of his duty as such officer." The protection to the res given to revenue officers is not extended to Court officers.

It has, however, been repeatedly ruled that actions against a receiver are in law actions against the receivership and that the contract, misfeasances, negligences, and liabilities involved in such a case are not personal and the judgments recovered against him as such receiver are payable only out of the funds in his hands as receiver.

Texas & Pacific R. R. Co. v. Cox, 145 U. S. 593, 603.
McNulta v. Lockridge, 141 U. S. 331, 332.

In the case at bar, no attempt was made to hold the receiver responsible as an individual for any act done under

color of his office or in performance of his duty as an officer." On the contrary, the case at bar merely seeks to charge the property in the hands of the receiver with liability on account of the negligence of the receiver and his agents in conducting the business connected with such property, subject, of course, to the general equity jurisdiction of the Federal Court appointing the receiver as to the payment and priority of whatever judgment might be recovered in the suit.

Since the Act of 1916, amending Section 33 of the Judicial Code, a district court in New York, two or three district courts in the 8th Circuit and the Circuit Court of Appeals of the Eighth Circuit have held that the Act of 1916 necessarily repealed the third section of the Act of 1887, as the latter Act was construed by the Supreme Court in the Gableman case, *supra*, and authorizes the removal from the state courts to the Federal Courts of tort actions against the receivers of railroad properties appointed by the federal courts, even where the actions in question were "in respect to the acts or transactions of the receiver in carrying on the business" connected with the railroad property of which he was receiver.

Mallaroza v. Hustis, 266 F. 882.
Newell v. Byram, 18 F. (2d) 657.
Berens v. Byram, 26 F. (2d) 953.
Newell v. Byram, 26 F. (2d) 200.

Exactly to the contrary of the above decisions are the following cases:

Slover v. Chicago R. R., 16 F. (2d) 609.
Knapp v. Byram, 21 F. (2d) 226.
Hartman v. Fleming (Mo.) 264 S. W. 873 (2d), 874.

There are two cases in which the Federal District Judges in the 8th Circuit have held that the amendment of 1916 to Section 33 of the Judicial Code also repeals by implication the inconsistent provisions of the Federal Employers

Liability Act, forbidding removal from a state to a federal court of any case arising under that Act.

Bevins v. Buram, 26 F. (2d) 953.
Elliott v. Wheelock, 34 F. (2d) 213.

It is to be observed that as to the last of these decisions, District Judge Reeves, who rendered it, admittedly does so because he felt constrained to follow the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Newell v. Buram*, 26 F. (2d) 200, although his individual opinion and judgment were contrary to that view of the matter.

In 1927, three judges of the District Court of Minnesota held that the provisions in the Employers Liability Act against removal was *not* repealed by implication by the amendment of 1916 to Section 33 of the Judicial Code.

Knapp v. Buram, 21 F. (2d) 226.

The decision last cited was rendered by three district judges in Minnesota, Messrs. Kant? Molyneux, and Sanborn. It is worthy of note that Judge Molyneux concurred with the other judges with respect to the non removability of employers liability cases, although he had previously taken exactly the opposite view and had refused to follow the opinion of Judge Reeves in the *Slover* case.

The opinion in the case of *Knapp v. Buram*, cited *supra*, is an exceedingly able one. It is much more comprehensive and much stronger, in the opinion of counsel for respondent, than the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Newell v. Buram*, 26 F. (2d) 200, or than any of the other opinions of the several district courts maintaining that cases of this character were removable, including the District Court of the Northern District of New York. The question at issue is exactly the same in the Employers Liability cases as it is in cases other than Employers Liability cases brought against Federal

receivers under the Act of 1887, because while the prohibition against removal is plainly expressed in the statute in the Employers Liability cases, it is equally plainly written into the statute, by construction of the Supreme Court in the *Gahagan* case, as to all cases against Federal receivers coming within the terms of the Act of 1887.

The Barnette case.

It is strongly contended by counsel for plaintiff in certiorari that the *Barnette* case sustains the ruling of the Circuit Court of Appeals for the 8th Circuit and is in conflict with the ruling of the Circuit Court of Appeals for the Fifth Circuit in the case at bar. The *Barnette* case was a suit to recover lands in the possession of the receiver of a corporation of Alaska created by the laws of Congress and in the hands of a receiver appointed by the Federal Court. The Court held that such a case was removable to the Federal Court under Section 28 of the Judicial Code as well as Section 33 of that Code.

> *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438 (1).

It was probably removable to the Federal Court under Section 28 of the Judicial Code because it was brought against the receiver of a corporation chartered by Congress.

> *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593.
> *Bankers Trust Co. v. Texas & Pacific R. R. Co.*, 241 U. S. 295. (4).

It is to be remembered also that the *Barnette* case was a suit against a bank and not against a railroad and therefore the fifth section of the Act of January 28, 1915, declaring "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that such railroad company was in-

corporated under an Act of Congress" has no application to the *Barnette* case.

38 Stat. (Part 1) p. 804.

Besides in the *Barnette* case it was sought to recover property in the hands of the receiver of the Federal Court and that Court has exclusive jurisdiction of all efforts to accomplish such a purpose.

Lion Bonding Co. v. Karatz, 262 U. S. 77, 89.
Field v. Kansas City Refining Co., 296 F. 800, 804, 806.

In the last case cited, the Court said:

"Gableman v. Peoria R. R. Co., 179 U. S. 335, is cited and relied on by appellant. There the party claimed to have been injured by failure of defendant company to properly operate gates at the crossing. *The claim* did not in any way *involve the question* of *possession or right* of title to property in *the possession of receiver.*" (*Italics mine*)
Ibid, p. 806.

In the *Barnette* case, the controversy between the majority and minority of the Court related entirely to whether or not the presumption that the cause had been properly removed could be indulged in here, since there was no challenge either in this Court or in the Circuit Court of Appeals of the right to removal.

Barnette v. Wells Fargo Nevada National Bank, 270 U. S. 438, 441.

Mr. Justice Stone, speaking for the Court, said:

"The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals nor is it challenged here."
Ibid, p. 440.

For these reasons we submit that the Court did not rule anything on this subject in the *Barnette* case, except that where the right to remove the case from a State Court to a District Court is not challenged at any stage of the proceedings, this Court would presume that the removal was rightful.

Does the Act of 1916 repeal by implication the Act of 1887?

The construction of the Act of 1916 adopted by the Circuit Court of Appeals for the 8th Circuit in the case of *Newell v. Byram*, 26 F. (2d) 200, involves the theory that necessarily the Act of March 3, 1887, Section 3, is repealed by implication by the Act of August 23, 1916. The construction adopted by the Circuit Court of Appeals for the 5th Circuit in the case at bar reconciles the two statutes and construes them together. The Act of 1916 contains no repealing clause, it does not in any way refer to the Act of 1887 and if it repeals that Act, or modifies it in any respect, it must do so by implication. To effect such a repeal, judicial construction is required and in such cases the attempt is to discover and declare the legislative intent.

It must be remembered that when the Act of August 23, 1916, was passed, it had been for almost thirty years the settled policy of the Government that suits against receivers appointed by the Federal Courts of the character of the case at bar should be tried in the State Courts and not removed to the Federal Courts and it was not the purpose or object of the Act of August 23, 1916, to change that policy.

As pointed out in the opinion of the Circuit Court of Appeals for the 5th Circuit in the case at bar, the report of the House Committee on the Bill that subsequently became the statute of August 23, 1916, contains the following expressions:

> "The statute, with the proposed amendment, does (fol. 43) not extend in any degree the jurisdiction or

> the powers of the courts of the United States. It merely provides a more orderly method of procedure which enures as much, in fact more, to the benefit of the states than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal; so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury.
>
> It will be observed, therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal courts, in case of prosecution in their official capacity, a regular and orderly right of removal from the State to the Federal courts, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officer to go into custody in order to obtain the writ."

The construction of the Act of August 23, 1916, by the Circuit Court of Appeals for the 8th Circuit in *Newell v. Bjoram*, *supra*, necessarily repeals by implication the Act of March 3, 1887, Section 3, and such will be the result unless the very reasonable construction placed on the former statute by the Circuit Court of Appeals for the 5th Circuit in the case at bar is sustained, or unless this Court shall determine, it seems to counsel entirely reasonable and proper, that in view of the existence of the Act of 1887 and the declared purpose of the Act of 1916, the effect of the latter Act was to afford the protection stated therein to "any officer" of the Courts of the United States who is employed and paid by the Government for his services and who regularly assists the Court in the administration of its general business, and does not include receivers, masters, attorneys or other persons appointed by the Court to assist in its administration of particular and special cases.

We believe that that is exactly what is meant by Congress by the Act of 1916. We respectfully urge that such a view of the matter is more reasonable than the proposition urged

in opposition thereto in the contention "it can be only said that the author of the report, in declaring the proposed amendment 'does not extend in any degree the jurisdiction or powers of the Courts of the United States' to some extent failed to foresee or may have deliberately failed to state the result of giving effect to the purpose so clearly expressed."

In the concluding section of this brief, we shall discuss the proper construction of apparently conflicting statutes so as to avoid repeal by implication and we hope to establish the contention that while the word "officer" in its broadest sense technically may embrace "receiver" and "manager", it does not necessarily do so and that it must be remembered that in the construction of statutes "words are sometimes employed with less than their largest literal meaning," (*Great Northern Railway Co. v. U. S.*, 155 Fed. 945, 961), and that the Congress could not have meant in this instance to have included "receivers" and "managers" in the word "officers" as employed in the Act of 1916, because Congress will be conclusively presumed to have known that a different rule had been prescribed by the Act of 1887 for "Receivers" and "managers."

III.

Repeal of statutes by implication.

Repeal by implication is never favored. It results only when there is positive repugnancy and irreconcilable difference between the two statutes. It cannot result where it is possible, by any reasonable construction, to allow both statutes to stand.

To effect a repeal by implication, judicial construction is necessary and in such cases the attempt is to discover and declare the legislative intent. The rule against repeal by implication is especially strong and especially applicable, where the prior law relates to a particular subject or class

of cases and the subsequent law is general in its term and operation.

The above are, we submit, the canons of statutory interpretation adopted by this Court in numerous cases and uniformly applied.

In the *Wood* case, Mr. Justice Story, speaking for this court, said:

> "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it: for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy. * * *"
>
> *Wood v. United States*, 16 Peters Star Page 363.

In the *McCool* case, Mr. Justice Swayne said:

> "If the plaintiff below can succeed in this action, it must be because the Act of 1857 impliedly repeals this provision as to this case. If there were no such statutory provision, the Act of 1857, being in derogation of the common law, would be construed strictly. 'A repeal by implication is not favored.' 'The leaning of the courts is against the doctrine, if it be possible to reconcile the two Acts of the Legislature together. Sedg. Stat. and Cons. Law, 127; Canal Co. v. R. R. Co., 4 Gill & J., 1; Bowen v. Lease, 5 Hill, 221; Williams v. Potter, 2 Barb., 316."
>
> *McCool v. Smith*, 1 Black 459, 471.

In *Townsend v. Little*, it was held where a prior act did not require attestation by witnesses of a deed by the mayor of lands included in a town site, it was not repealed by a subsequent general statute requiring *all* deeds to be attested by at least two witnesses. In that case, Mr. Justice Woods, speaking for the court, said:

> "* * * According to the well settled rule, that general and specific provisions, in apparent contradic-

tion, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. Pease v. Whitney, 5 Mass., 380, Nichols v. Bertram, 3 Pick., 342; State v. Perrysburg, 14 Ohio St., 472; London, etc., Railway v. Wandsworth Board of Works, L. R. 8 C. P., 185; Bishop on the Written Laws, sec. 112 a.

Townsend v. Little, 109 U. S. 504, 512.

In the *Crow Dog* case, Mr. Justice Matthews said:

"It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The Treaty of 1868 and the agreement and Act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. Wood v. U. S., 16 Pet., 342; Daviess v. Fairbairn, 3 How., 636; U. S. v. Tynen, 11 Wall., 88 (78 U. S. XX., 153); State v. Stoll, 17 Wall., 425 (84 U. S. XXI., 650).

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *Generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, C. J., in Thorpe v. Adams, L. R., 6 C. P., 135, 'To the construction of Acts of Parliament is that a

general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champneys, 30 L. J. Ch., 782, 2 Johns. & H., 31-54, 'that the Legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.''

Ex Parte: In the Matter of Kan-gi-shun-ca, Otherwise Known as Crow Dog, 109 U. S. [illegible]

In the *Chew Heong* case, Mr. Justice Harlan said:

"* * * In State v. Stoll, 17 Wall., 430 (84 U. S., XXI., 654), the language of the court was that 'It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.' See also Ex parte Crow Dog, 109 U. S., 570 (XXVII., 1035); Arthur v. Homer, 96 U. S., 140 (XXIV., 812); Harford v. U. S., 8 Cranch, 109."

Chew Heong v. U. S., 112 U. S. 536.

In the case of the *Church of the Holy Trinity*, it was held that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit and not within the intention of its makers and that in determining the question of intent the reports of the committees of the two houses of Congress may be considered.

Church of the Holy Trinity v. U. S., 143 U. S. 457.

In the *Frost* case, Mr. Justice Harlan said:

"* * * It is well settled that repeals by implication are not to be favored. And where two statutes

cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute. McCool v. Smith, 66 U. S. 1 Black, 459, 468 (17: 218, 221); United States v. Tynen, 78 U. S. 11 Wall. 88, 93 (20: 153, 154); Red Rock v. Henry, 106 U. S. 596, 601 (27: 251, 253); United States v. Three Hundred and fifty-six Caddies of Tobacco, 78 U. S. 11 Wall. 652 (20: 235); King v. Cornell, 106 U. S. 395, 396 (27: 60).

Frost v. Wenie, 157 U. S. 46.

In the *Healey* case, it was held that the Act of 1887, fixing the price of all desert lands at $1.25 per acre, does not repeal a prior statute fixing the price of certain specified kinds of desert lands at $2.50 per acre. In that case, Mr. Justice Harlan said:

"'It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.'"

U. S. v. Healey, 160 U. S. 136, 147.

In the *Greathouse* case, it was held that the Tucker Act, fixing six years as the statute of limitations on all claims against the Government, did not repeal the proviso of a prior Act, excepting from the limitation all persons beyond

the seas and laboring under other disabilities. In that case, Mr. Justice Harlan said:

> "[. . . . .] Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. Frost v. Wenie, 157 U. S. 46, 58 (39: 614, 619); United States v. Healey, 160 U. S. 136, 147 (40: 369, 373)."
>
> *U. S. v. Greathouse*, 166 U. S. 601, 605.

In the *Rodgers* case, Mr. Justice Brewer said:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special, the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In Ex Parte Crow Dog, 109 U. S. 556, 570, sub nom. Re Kang-Gi-Shun-Ca, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396, 405, this court said:
>
> 'The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is generalia specialibus non derogant.' 'The general principle to be applied,' said Bovill, Ch. J., in Thorpe v. Adams, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the

> subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys, 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31-54, "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." ""
> *Rodgers v. U. S.*, 185 U. S. 83, 87, 88.

In the *Nix* case, this Court held that a general statute, fixing the compensation of all marshals throughout the United States, did not operate to repeal a prior special statute fixing a different rule in Oklahoma; in that case, Mr. Justice Brown said:

> "The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357, that special and general statutory provisions may subsist together, the former qualifying the latter. See also Churchill v. Crease, 5 Bing. 177; Magone v. King, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. 525, and cases cited; State v. Clarke, 25 N. J. L. 54."
> *U. S. v. Nix*, 189 U. S. 199, 205.

In the *Binns* case, this Court held that it was entirely proper for the Court to examine reports of committees of either house of Congress, with a view to determining *the scope* of the statutes passed on the strength of such reports.

> *Binns v. U. S.*, 195 U. S. 486, 495.

In the *Petri* case, this Court held that the Judiciary Act of March 3, 1887, making general provisions for the Federal District Courts throughout the country, did not repeal a prior statute relating to Federal Districts in Illinois; in this case Mr. Justice White said:

"It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject, and the subsequent law is general in its operation."

Petri v. F. F. Creelman, 199 U. S. 487, 497.

In *Ex Parte United States*, Mr. Chief Justice White said:

"* * * When the issue is thus narrowed, solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. Petri v. F. F. Creelman Lumber Co., 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 133. * * *"

Ex Parte United States, 226 U. S. 420, 424.

In *Washington v. Miller*, it was held that a later general statute did not repeal a prior special statute and Mr. Justice Van Devanter said:

"* * * In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog (Ex parte Kang Gi

Shin Ca), 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

Washington v. Miller, 235 U. S. 422, 428.

Mr. Justice Van Devanter, while on the Circuit bench, thus stated the rule in the *Great Northern R. R. Co. et al. v. U. S.* case:

"'To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject matter of a prior one, employs language broad enough to cover some part or all of it; for as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes can not stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.'"

Great Northern R. R. Co., et al. v. U. S., 155 Fed. 945, 960, 961.

Conclusion.

Tested by the foregoing canons of statutory construction, laid down by this Court, we respectfully insist:

First, that the certiorari act of February 13, 1925, while applying by its terms to "any case" pending in a Circuit Court of Appeals, does not repeal by implication the prior act of March 3, 1887, prohibiting the review of an order of remand to the State Court by the provision that "such remand shall be immediately carried into execution"; that the prior special statute, applicable to remands only, remains in force as an exception the later general act, applicable to "any case."

Second, that the Act of August 23, 1916, adding the words "or against any officer of the courts of the United States, for and on account of any act done under color of his office or in performance of his duty as such officer" does not repeal, by implication, the prior act of March 3, 1887, (section three) now codified in Title 28, Section 125 of the U. S. C., authorizing the bringing of certain suits against the "Receivers" or "Managers" of property, appointed by the courts of the United States, in the State courts.

The later act does not expressly repeal the prior act,—it makes no reference to it and contains no repealing clause. It can only repeal it by implication if such was the evident purpose of Congress, and the contrary is evident. It is to be presumed that when it enacted the law of 1916 Congress knew of the existence of the law of 1887, and since it did not expressly repeal it, intended that the prior statute should remain as an exception to the later and more general statute.

"If the two statutes can stand together, they must so stand." Any construction of the later statute that does not make it utterly meaningless is to be preferred to a construction that repeals the prior statute.

These two statutes can stand together (a) by giving to the act of 1916 the construction placed upon it by the Circuit Court of Appeals of the Fifth Circuit in the case at bar; (b) by construing the word "officer" in the Act of 1916 to mean only the officers of the Court appointed and paid by the government, and as not including "Receivers", who at best are officers of the Court in only a very general sense, as attorneys admitted to practice therein are officers, especially in view of the fact that the prior statute of 1887 had established a contrary rule as to the removal of causes by such receivers.

For all of these reasons, we submit, first, that the petition for certiorari should be dismissed by the Court, and sec-

ond, that the judgment of the Circuit Court of Appeals for the Fifth Circuit, in this case, should be affirmed.

Respectfully submitted,

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FILE COPY

FEB 3 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 663.

CHARLES GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY,
Petitioner,

against

MAJOR RUFF,
Respondent.

Certiorari to United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF W. R. C. COCKE AND JAMES F. WRIGHT, ATTORNEYS FOR LEGH R. POWELL, JR. AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AS AMICI CURIAE.

W. R. C. COCKE
JAMES F. WRIGHT

Attorneys for Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company.

Norfolk, Va.

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The brief for the petitioner sets forth quite clearly and admirably the narrow issue involved here in this cause. It is, therefore, needless that we should restate the contentions in detail. While the issue here involved is one of serious importance, the question presented has been clearly presented by the brief for the petitioner. Our motion for leave to file a brief as *amici curiae* was designed to emphasize the practical import-

ance of the question before the court and to add such argument of a non-repetitive character as would serve to emphasize what we believe to be the logic of petitioner's position.

I.

The amendment of August 23, 1916 to Section 33 of the Judicial Code needs no interpretation.

> "A legislative intention to be efficient as law must be set forth in a statute; it is therefore a written law. How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous, *so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.* And where the intention of a statute has been ascertained by the application of the rules of interpretation, they have served their purpose, for all such rules are intended to reach that intent. The sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to give effect to its intention. When that is plain and palpable they must follow it implicitly. The rules of construction with which the books abound *apply only where the words used are of doubtful import;* they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. This is true whether the statute be public or private, general or special, remedial or penal. These rules are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules

> would introduce great uncertainty, and would involve a power virtually legislative. When a doubt arises upon the construction of the words it is the duty of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful."
>
> *Lewis' Sutherland Statutory Construction* (2nd edition), Sec. 363. (Italics ours here and elsewhere.)

It is manifest that the language of the amendment of August 23, 1916, is so thoroughly free from ambiguity as to render so-called interpretation entirely unnecessary. The language of the statute is that the specified civil suit or criminal prosecution may be removed by the defendant officer into the proper district court whenever the act on which it is founded shall have been "any act done under color of his office or in the performance of his duties as such officer." The Circuit Court of Appeals in its opinion in this case clearly admits that the act of the petitioner as receiver of Savannah & Atlanta Railway of which the respondent complains was clearly done by the receiver under color of his office or in performance of his duties as such officer. It is therefore unnecessary to dilate upon the legal meaning of the term "color of office." The vital defect in the reasoning of the Circuit Court of Appeals is the substitution *of its conception of* the report of a legislative committee for the statute itself. The use by the Circuit Court of Appeals of the report of the House Committee on the Judiciary is not in order to interpret or construe Section 33 of the Judicial Code but to destroy it in one of its essential phases. This is not a permissible method of statutory

construction. It so was indicated by this Court in *United States* v. *Goldenburg*, 168 U. S. 95, 18 Sup. Ct. Rep. 3, where the Court said:

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no fuction of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, *no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.*"

The use of legislative journals and committee reports may be indulged in where a genuine doubt exists as to the meaning of the language of statutes but not otherwise. In a decision by this court in 1929 the following unequivocal statement of the rule was made:

> "Where doubt exists and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure, and other like extraneous matter, may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken

as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

United States, et al. v. *Missouri Pacific R. Co.*, 278 U. S. 269.

II.

Had the act of August 23, 1916, amending Judicial Code Section 33, not already become law and were the Congress now considering such an Act, the genius of the law would require that it conform to the construction placed upon it by the district court in the cause.

While the respondent (appellant in the court below) contended in the district court that the petitioner was not an "officer of the court" within the meaning of the amendment of August 23, 1916, both the District Court and Circuit Court of Appeals held otherwise. There can be no question that petitioner was and is an officer of the United States District Court for the Southern District of Georgia by virtue of the appointment as receiver of the Savannah & Atlanta Railway. (*Booth* v. *Clark*, 17 Howard, 322, 330; *Milwaukee & M. R. Co.* v. *Sutter*, 2 Wall. 510, 519). To hold then that such an officer should be denied the protection of the courts of the United States while at the same time other officers of such courts are accorded that protection is inconsistent with the spirit of the legislation.

The intent and spirit of Section 33 of the Judicial Code, as amended, is that the courts shall control and,

if need be, protect those intrusted with the discharge of the cares and responsibilities of the appointing courts over trust property in their keeping. If the power of the courts of the United States to control and protect the officers appointed by them is held to extend to some but not to all such officers, then the intent of the law is defeated.

The Federal statutes indicate the clear purpose of Congress to vest the district courts in their administration of receiverships with control not only of the properties of the receivership estate, but also over the proceedings and judgments that might affect the assets in the custody and control of the receivers. Thus, Section 66 of the Judicial Code provides:

> "*Suits against receiver.* Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; *but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.*"

Thus, even judgments of a court other than the court appointing the receivers may not conclusively adjudicate the liabilities of the latter if in the sound judgment of the courts of appointment equity and the proper administration of the receivership estate prohibit.

The reasons for according control over judgments rendered against receivers by courts other than the

courts of appointment are equally appropriate to support the right to remove suits into the Federal courts, where the law is more uniformly interpreted under the supervisory jurisdiction of this court and both plaintiff and defendant receivers wherever sued will have their rights adjudicated by those tribunals.

The essential purpose of Section 33, as amended, was to protect the Federal sovereignty in respect of matters within its special sphere. Accordingly, there is no greater basic reason for permitting Federal officers other than receivers to remove causes against them than for permitting receivers to do so.

A contention somewhat analogous to that of the appellee was made with reference to the meaning of the word "person" as employed in the Fourteenth Amendment to the Constitution of the United States. It was sought to establish the doctrine that a corporation is not a "person" and therefore not entitled to the protection contemplated by that amendment. But it was manifest that the spirit of the amendment admitted of no such narrow definition. To give partial protection, to permit partial injustices by leaving unprotected numberless persons created by law, would clearly be destructive of the spirit of equality that the amendment proclaimed. Hence, it was decided in *Charlotte, Columbia & Augusta Railroad Co.* v. *Gibbs*, 142 U. S. 386, that private corporations are persons within the meaning of the amendment. The purpose of the amendment demanded that construction. The intent of the Act of August 23, 1916, amending Judicial Code Section 33, by the same process of reasoning demands that all officers of the courts of the United States be accorded equal recourse to the courts of the

same judicial system. If all such officers are not equally accorded the protection of the law as written, then the phrase "any officer" as used in the law is accorded a limited meaning not found in either the language or in the evident purpose of the law.

The act of August 23, 1916, amendatory of Judicial Code Section 33 is a procedural and remedial statute and as such is to be liberally construed. But beyond this elemental principle there is the further rule of law that procedural statutes should be given a construction which will preserve the essentials of harmony and consistency in the judicial system. (*Federal Credit Co.* v. *Zeperrick*, 153 Miss. 489, 120 So. 173; *Henovic* v. *New York Central & H. R. R. Co.*, 154 N. Y. 278, 48 N. E. 525). To hold that "*any* officer of the courts of the United States" cannot remove to a Federal court a civil suit or criminal prosecution commenced against him in a state court on account of an act done under color of his office is to create, in a measure, disharmony and inconsistency in the Federal judicial system.

Respectfully submitted,

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February 2, 1934. *Norfolk, Va.*

CORRECTED COPY page 2.

SUPREME COURT OF THE UNITED STATES.

No. 663.—October Term, 1933.

Charles E. Gay, Jr., Receiver, Petitioner, vs. Major Ruff. } On Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[April 2, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

Ruff brought in a state court of Georgia this suit against Gay, as receiver of the Savannah & Atlanta Railway, appointed by the federal court for southern Georgia sitting in equity. The cause of action alleged is the homicide of plaintiff's minor son as a result of the negligent operation of a train by employees of the receiver. Before trial in the state court, the receiver duly filed in the appropriate federal court a petition for removal and certiorari, under the amendment made by Act of August 23, 1916, c. 399, 39 Stat. 532 to Judicial Code § 33, which inserted therein the clause:

"or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer."[1]

[1] The section as so amended reads: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against *any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer*, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court in the following manner:" [The amendment of 1916 is indicated by the italics.]

The federal court denied a motion to remand, 3 Fed. Supp. 264, and thereafter dismissed the suit, entering a final judgment for want of prosecution. The Circuit Court of Appeals for the Fifth Circuit reversed that judgment, with direction to set aside the dismissal and remand the cause to the state court. 67 F. (2d) 681. Because of conflict of decisions, certiorari was granted to determine whether the amendment to Judicial Code § 33 authorizes a receiver of a railroad appointed by a federal court sitting in equity to remove from a state court an action brought against him as receiver for damages resulting from the negligent operation of a train by his employees.

First. The respondent raises the preliminary question whether this Court has jurisdiction to review the action of the Circuit Court of Appeals. The contention is that this Court lacks jurisdiction to review a judgment directing the remand to a state court, because Judicial Code § 28, declares:

"Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."[1]

This provision, enacted in 1887, was broadly construed by this Court as prohibiting review of an order of remand, directly or indirectly, by any proceeding. The prohibition was applied to appeals

[1] Newell *v.* Byram, 26 F. (2d) 200, 202 (C. C. A. 8th); and following cases in district courts. Matarazzo *v.* Hustis, 256 Fed. 882, 887 (N. D. N. Y.); American Locomotive Co. *v.* Histed, 18 F. (2d) 656 (W. D. Mo.); Behrens *v.* Byram, 26 F. (2d) 953 (D. So. Dak.); Elliott *v.* Wheelock, 34 F. (2d) 2 Compare Jones *v.* McGill, 46 F. (2d) 334 (D. N. H.); Snider *v.* Sand Spr By., 62 F. (2d) 635, 636 (C. C. A. 10th); Knapp *v.* Byram, 21 F. (2d) (D. Minn.). See also Barnette *v.* Wells Fargo National Bank, 270 U. S. 441.

Prior to the Act of March 3, 1875, c. 137, § 5, 18 Stat. 470, 472, an of of the circuit court remanding a cause to the state court could not be viewed by this court on appeal or writ of error because it was not a judgment; but it could be reviewed by mandamus. Chicago & Alton R Co. *v.* Wiswall, 23 Wall. 509. By the Act of 1875, express provision made to review the remand by appeal or writ of error. That provision repealed by Act of March 3, 1887, c. 373, § 2, 24 Stat. 552, 553 (corr by Act of August 13, 1888, c. 866, § 2, 25 Stat. 433, 435), which enacted provision embodied in Judicial Code § 28.

from, and writs of error to, the federal circuit [and later district] court; to writs of error to a state court after final judgment there; and to mandamus in this Court.[4] In *German National Bank* v. *Speckert*, 181 U. S. 405, 409, where the trial court had refused to remand the case to the state court and the Circuit Court of Appeals had reversed that judgment and ordered a remand, this Court held that it was without jurisdiction to review the latter's action. While adverting in support of its conclusion to the broad construction which had been given to the above-quoted prohibition, the Court ruled there that the fact that an order of remand is not a final judgment precluded its review by writ of error.[5]

But by reason of the extensive power to issue writs of certiorari which the Circuit Court of Appeals Act of 1891[6] thereafter gave to this Court, it may now review the action of the circuit court of appeals in directing the remand of a cause to the state court. That Act provided that in any case in which the judgment of the circuit court of appeals is made final, "it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." In *Forsyth* v. *Hammond*, 166 U. S. 506, 512, it was held that the power given was unaffected by the condition of the case as it exists in the circuit court of appeals; that the power may be

[4]Morey *v.* Lockhart, 123 U. S. 56, 58; In re Pennsylvania Co., 137 U. S. 451; McLaughlin Bros. *v.* Hallowell, 228 U. S. 278; Yankaus *v.* Feltenstein, 244 U. S. 127; Ex parte Matthew Addy S. S. Corp., 256 U. S. 417. Compare Pickwick-Greyhound Lines, Inc. *v.* Shattuck, 61 F. (2d) 485.

[5]The contention made by respondent that the prohibition in § 28 does not extend to cases under § 33, because of the saving clause in § 5 of the Acts of 1887 and 1888, appears to be unfounded. See Cole *v.* Garland, 107 Fed. 759; dismissed on appeal, 183 U. S. 69. Compare Kentucky *v.* Powers, 139 Fed. 452, 593. Moreover, the saving clause of § 5 of the Acts of 1887 and 1888 was in terms applicable to Revised Statutes §§ 641, 642, 643; and those sections were repealed expressly by the Judicial Code. Their substance was carried into §§ 31, 32, 33, respectively, of the Judicial Code; but § 5, though not expressly repealed, was nowhere carried into the Judicial Code. See, also, Index of Federal Statutes (1934), p. 1297, Footnote 44, which states that by reason of the express repeal of Secs. 1-4, 6, 7, of the Act of 1887 by the Judicial Code, "Sec. 5 can have no force independent of the remainder of the act."

[6]March 3, 1891, c. 517, § 6, 26 Stat. 826, 828.

exercised before, as well as after, any decision by that court and irrespective of any ruling or determination therein; and that the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals. The jurisdiction to review interlocutory orders was exercised in *American Construction Co.* v. *Jacksonville*, 148 U. S. 372; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133; *Spiller* v. *Atchison etc. R. Co.*, 253 U. S. 117, 121; and *Du Pont Powder Co.* v. *Masland*, 244 U. S. 100. And in *The Three Friends*, 166 U. S. 1, 49, it was held that this Court could review a case pending in, and not yet decided by, the circuit court of appeals, with the same power and authority as if it had been carried here by appeal or writ of error "that is, as if it had been brought directly from the District or Circuit Court." In *Chicago, Burlington & Quincy R. R.* v. *Willard*, 220 U. S. 413, decided under the Act of 1891, this Court, without questioning its power, reviewed the judgment of the circuit court of appeals reversing a judgment of dismissal and ordering a remand. Nor has the existence of the power been questioned by the Court since.

Second. The contention that the removal is authorized rests upon the amendment made by the Act of 1916 to Judicial Code § 33. The argument for removal is that, since the receiver is an "officer" of the federal court and an action for damages resulting from the negligent operation of a train by his employees is a suit "for or on account of" an "act done in the performance of his duties as such officer", the removal here in question is directed in such plain words that there is no room for any other construction of the statute. But the amendment may not be isolated from its context. It must be read in the light of the then existing provisions of § 33; of the then existing statute conferring the right to bring in a state court suits against receivers; of the statute denying removal from state to federal courts of a large class of cases similar in character to that before us; and of other legislation restricting the jurisdiction of federal trial courts. When the clause is so read, there arises at least a doubt whether Congress intended

[1] The Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, amending § 240 (a) of the Judicial Code, gives in terms the power to review by writ of certiorari "either before or after a judgment or decree" of the lower court, "with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

to give to the words inserted in § 33 the comprehensive meaning attributed to them. That doubt makes it appropriate to examine the history of the amendment. *Binns* v. *United States*, 194 U. S. 486, 495; *United States* v. *St. Paul, Minn. & Manitoba Ry.*, 247 U. S. 310, 318. And such examination makes it clear that Congress did not authorize the removal of this case.

Judicial Code § 33 enables a defendant in a state court to remove the case before trial or final hearing there, and thus secure an adjudication by a federal court of first instance of the issues of fact as well as law involved in his justification under the federal statutes. *Tennessee* v. *Davis*, 100 U. S. 257, 263. The origin of that section is § 3 of the "Force Act," March 2, 1833, c. 57, 4 Stat. 632, 633 — the nation's reply to South Carolina's threat of "nullification." The purpose of the Force Act was to prevent paralysis of operations of the federal government. The special aim of § 3 was to protect those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law. This removal provision was extended by Act of March 3, 1875, c. 130, § 8, 18 Stat. 371, 401, to suits against "any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House." These provisions only are embodied in Judicial Code § 33.[1] The scope of the section was thus limited to cases arising out of the enforcement of the revenue laws or of some order of either House of Congress. And it applied in those cases only when the person

[1] There had been several other acts amending § 3 of the Force Act and § 643 of the Revised Statutes which embodied it. While § 3 of the Act of 1833 provided in terms for removal where the suit is against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof," the title of the Act referred only to collection of duties on imports. Doubtless, for this reason, it was deemed desirable in the Internal Revenue Act of June 30, 1864, c. 173, § 50, 13 Stat. 241, to extend the operation of the 1833 Act in terms to internal revenue officers and those acting under the internal revenue laws. Compare Hornthall *v.* Collector, 9 Wall. 560, 561. By Act of July 13, 1866, c. 184, § 68, 14 Stat. 98, 171, that provision was repealed; and by § 67 of the same Act this removal provision was made available to any officer acting under the internal revenue laws or "against any person acting under or by authority of such officer." By Act of February 28, 1871, c. 99, § 16, 16 Stat. 433, 438, the provision was extended to those engaged in enforcing laws for the protection of the elective franchise. In Revised Statutes § 643 this provision appears:

defending caused it to appear that his defense was that in doing the acts charged he was doing no more than his duty under those laws or orders."

To appreciate the exceptional character of the removal privilege conferred by § 33, that section should be compared with § 28. Of the two, § 33 alone provides for removal of a criminal case. Removal of civil causes is provided for in both § 33 and § 28 of the Judicial Code. But the civil cases to which § 33 is applicable are few. While § 28 applies to many. Under the latter, any officer of a federal court can remove a suit brought against him on account of any act done under color of his office or in the performance of his duties as such officer, because § 28 applies to "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, ... of which the district courts of the United States are given original jurisdiction." But in order to avail of the removal privilege conferred by § 28 in respect of a suit arising under the Constitution or laws of the United States, the facts showing that the suit is of that class must appear by the complaint in the state court;[10] the amount in controversy must exceed $3000, except in those cases where jurisdiction is conferred regardless of amount;[11] the petition for removal must be filed in the state court before the time fixed for answer there; and it must be accompanied by a bond. On the other hand, where § 33 is applicable, the conditions for removal are much more liberal. Removal may be had of the civil suit, at any time before trial or final hearing[1] in the state court, regardless of the amount,

but by Act of February 8, 1894, c. 25, 28 Stat. 36, most of Title XXVI of the Revised Statutes relating to elective franchises was repealed and with it that part of § 643 relating to the elective franchise.

It was held in Maryland *v.* Soper (No. 1), 270 U. S. 9, that by the National Prohibition Act, October 28, 1919, c. 85, Title II, § 28, 41 Stat. 316, this removal provision was extended to prohibition officers or agents engaged in the enforcement of that act. See also Colorado *v.* Symes, 286 U. S. 510, 517.

[1] Maryland *v.* Soper (No. 1), 270 U. S. 9, 31; Maryland *v.* Soper (No. 2), 270 U. S. 36; Safety Ry. Co. *v.* Boston Ry. Co., Fed. Cas. No. 12,249; People's Bank *v.* Goodwin, 102 Fed. 937; Application of Shumpka, 268 Fed. 686; Florida *v.* Huston, 283 Fed. 687; Ford Motor Co. *v.* Automobile Ins. Co., 13 F. (2d) 415.

[2] Walker *v.* Collins, 167 U. S. 57; Mayo *v.* Dockery, 108 Fed. 897.

[3] Compare Bock *v.* Perkins, 139 U. S. 628; Feibelman *v.* Packard, 109 U. S. 421; Lawrence *v.* Norton, 73 Fed. 1; Eighmy *v.* Poucher, 83 Fed. 855.

[4] In re Duane, 261 Fed. 242.

involved and without giving any bond, by filing the appropriate papers in the federal court.[13] And the facts showing that the suit is of a removable class need not appear by the complaint in the state court.

Third. The case here sought to be removed has none of the characteristics of those which were removable under Judicial Code § 33 before the 1916 amendment. This suit is under the law of Georgia; and was brought as of right in the state court. *Erb* v. *Morasch*, 177 U. S. 584. It does not relate to any operation of the federal government. The defendant receiver does not justify under any judgment or order of a federal court. Nor does the suit present otherwise any federal question. Its only relation to the federal law is that the receiver sued was appointed by a federal court, in the exercise of its diversity of citizenship jurisdiction. The fact that the defendant is a federal receiver does not make the cause removable "upon the ground that it was a case arising under the Constitution and laws of the United States." *Gableman* v. *Peoria, Decatur & Evansville Ry.*, 179 U. S. 335.

If the amendment of 1916 is construed as merely affording the protection of removal to officers of the court engaged in executing its judgments or orders, it is strictly *in pari materia* with the other removal provisions of § 33. If it is construed so as to authorize removal of the case at bar, it introduces a wholly different ground of jurisdiction; in effect, repeals by implication legislation which deals expressly with suits against receivers; and departs from the established trend of legislation limiting the jurisdiction of the federal trial courts.

I. Congress provided in 1887 that the fact that the defendant was a federal receiver should not preclude the maintenance of an action against him in a state court.[14] That provision had recently been embodied in § 66 of the Judicial Code which declares:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed."

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[13] Virginia *v.* Paul, 148 U. S. 107, 115.

[14] Act of March 3, 1887, c. 373, § 3, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 866, § 3, 25 Stat. 433, 436.

In the thirty nine years since its enactment there had not b
so far as appears, any attempt to repeal that law. It is in
mony with the trend of legislation providing that the fed
character of the litigant should not alone confer jurisdiction u
a federal court a policy acted upon in case of national bank
early as 1882[14] and which had been extended in 1915 to railro
having federal charters.[15]

II. Congress had by the Federal Employer's Liability Act[16]
vided that suits for injuries resulting from negligence in
operation of a railroad, although arising under a federal stat
could be brought in a state court, and if so brought, could no
removed to the federal court.

III. Congress had by recent legislation manifested its adhere
to the policy, inaugurated in 1887, of restricting the jurisdict
of the federal trial court. Thus, the prescribed jurisdictio
amount, which, after standing for nearly a century at $500
been raised to $2,000 in 1887,[18] and was increased to $3,000

[14]Act of July 12, 1882, c. 290, § 4, 22 Stat. 162, 163; Act of March 3, 1
c. 373, § 4, 24 Stat. 552, 554; Act of August 13, 1888, c. 866, § 4, 25 S
433, 436.

[15]Act of January 28, 1915, c. 22, § 5, 38 Stat. 803, 804. This policy
persisted since. By Act of February 13, 1925, c. 229, § 12, 43 Stat 936,
federal incorporation as a ground of federal jurisdiction is abolished ex
where the United States holds more than one-half of the stock.

[16]Act of April 22, 1908, c. 149, § 6, 35 Stat. 65, 66, as amended by Ac
April 5, 1910, c. 143, § 1, 36 Stat. 291. The policy of abridging the jurisdict
has persisted since. Actions against the Director General of Railroads u
§ 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 456
against the Agent designated by the President pursuant to § 206a of Transpo
tion Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 461, for injuries, whe
the cause of action is based on the Federal Employers Liability Act, or a
statute or the common law, may not be removed even if there is diversit
citizenship. Davis *v.* Slocomb, 263 U. S. 158, 160. The lower courts
divided on whether the 1916 amendment repeals this provision by the
ployers Liability Act *pro tanto*. That it has: Elliott *v.* Wheelock, 34 F.
213; *contra*, Knapp *v.* Byram, 21 F. (2d) 226.

Likewise, removal is prohibited of actions by seamen under § 33 of
Merchant Marine Act of June 20, 1920, c. 250, 41 Stat. 988, Engel *v.* Da
port, 271 U. S. 33, 38; Herrera *v.* Pan-American Petroleum & Transport
300 Fed. 563. And by Act of May 27, 1933, c. 38, § 22 (a), 48 Stat. 74
suits brought in a state court under the Securities Act may not be remove

[18]Compare Judiciary Act of September 24, 1789, c. 20, § 12, 1 Stat.
Act of March 3, 1887, c. 373, § 1, 24 Stat. 552; Act of August 13, 1
c. 866, § 1, 25 Stat. 433.

1911.[19] Moreover, in 1911 the requirement of this jurisdictional amount was applied to the removal of actions under the Interstate Commerce Act against railroads for injury to or loss of property, although theretofore federal courts had jurisdiction regardless of the amount in controversy.[20]

Fourth. There is no expression in the Act of 1916, or in the proceedings which led to its enactment, of an intention to repeal any existing law or to depart from the long existing policy of restricting the federal jurisdiction. Whether there was any special occasion for the amendment does not appear. The bill was passed in each House as introduced, without amendment, without debate and without a record vote.[21] The legislation was not required in order to assure to officers of the federal courts when engaged in enforcing the laws or orders to which § 33 related the same protection which it then afforded to other persons. Marshals executing revenue laws had, for more than fifty-eight years, repeatedly availed themselves of this removal provision.[22] But an extension of the removal provision might have been desired so as to make it apply to those engaged in executing any judgment or order of a federal court: For any order of the court might arouse opposition to those engaged in enforcing it and result in retaliation by means of proceedings instituted in a state court. The only method

[19] Act of March 3, 1911, c. 231, § 24 (1), 36 Stat. 1087, 1091.

[20] Act of January 20, 1914, c. 11, 38 Stat. 278, amending § 28 of the Judicial Code.

[21] The amendment was introduced in the House on April 6, 1916, as H. R. No. 14299. It was referred to the House Committee on the Judiciary, which in turn referred it to a subcommittee. The latter reported it favorably to the full Committee, which in turn reported it favorably to the House. (64th Cong., 1st Sess., H. Rept. No. 776.) As far as appears there were no hearings before the subcommittee or the committee. It was placed on the Calendar For Unanimous Consent and passed without debate or record vote; 53 Cong. R., 9442. In the Senate it went through substantially the same course. The calendar of the Judiciary Committee of the Senate shows no record of a hearing. It was reported out favorably without a printed report; was considered in the Senate sitting as a Committee of the Whole; was reported by it without amendment; and was passed without debate or record vote. 53 Cong. R., 12167-12168. No reference to the legislation, either as proposed or as enacted, appears in the Annual Reports of the Attorney General.

[22] See Davis *v.* South Carolina, 107 U. S. 597; Georgia *v.* O'Grady, 3 Woods 496; Georgia *v.* Bolton, 11 Fed. 217; North Carolina *v.* Gosnell, 74 Fed. 734; Carico *v.* Wilmore, 51 Fed. 196; Delaware *v.* Emerson, 8 Fed. 411.

of securing in such other cases an adjudication in the federal court before trial in the state court was then by habeas corpus; and that remedy was not always adequate.[2]

The report of the Judiciary Committee of the House which recommended the adoption of the 1916 amendment establishes that such was the sole purpose of Congress. It states:[3]

"The purpose of the proposed amendment is to extend the provisions of section 33 uniformly to officers of the courts of the United States, not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws, and to officers of Congress. The omission of such a provision from the original act gives rise to certain incongruities and creates a want of uniformity in the application of the law; for example: a United States marshal engaged in the execution of a warrant or other process of the United States court, in a case which involves the prosecution of a violation of the revenue laws, is entitled to the right of removal, now conferred by this statute. (*Davis* v. *South Carolina*, 107 U. S. 597 (1882). The same marshal engaged in executing process of the same court in which the revenue law is not involved is not entitled to the right of removal. This creates an anomalous condition which cannot be justified upon any line of reasoning.

"The statute, with the proposed amendment, does not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure which enures as much, in fact more, to the benefit of the States, than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for trial before a court and jury."

Among other reasons, because the relief on habeas corpus is to some extent discretionary. Since the officer if successful upon habeas corpus may be released unconditionally without a jury trial, the federal court may be unwilling to give relief unless the justification is clear upon the preliminary showing. Compare United States v. Lewis, 200 U. S. 1; Whitten v. Tomlinson, 160 U. S. 231, 240; In re Miller, 42 Fed. 307; Walker v. Lea, 47 Fed. 645; In re Neagle, 51 Fed. 277; In re Matthews, 122 Fed. 248.

[2] H. R. No. 776, 64th Cong., 1st Session. The rest of the report is devoted to a discussion of these propositions. As indicating a lack of intention to extend broadly the right of removal in civil suits against an officer of the courts, it states: "In a civil suit against a Federal marshal on account of acts done by him as such marshal, such suit is now removable to the federal courts though no revenue law is involved (Bock v. Perkins, 139 U. S. 628 (1891) and Wood v. Drake, 70 Fed. 881 (1895))."

The action of the Circuit Court of Appeals in reversing the judgment of the District Court and directing that the cause be remanded to the state court was proper. A suit for damages for an injury resulting from negligent operation of a train is not, within the meaning of Judicial Code § 33 as amended, a suit "for or on account of any act done under color of his [the receiver's] office." The receiver here sued, although an officer of the court operating the railroad pursuant to the order appointing him, is not an officer engaged in enforcing an order of a court. The operation of trains through his employees is a duty imposed upon the receiver; but he is not entrusted in his capacity as receiver with the service or execution of any process of the court. Nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated.

In *Barnette* v. *Wells Fargo Bank*, 270 U. S. 438, 441, the record does not disclose on what ground removal was sought and allowed in the District Court or the jurisdiction was sustained by the Circuit Court of Appeals. Enough appears, however, to show that the case was wholly unlike that now before us.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.